United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7204

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7204



MIKE J. BATCHKOWSKY,
Plaintiff-Appellee,

against

PENN CENTRAL COMPANY a/k/a PENN CENTRAL TRANSPORTATION COMPANY,
Defendant and Third Party Plaintiff-Appellee,

against

ANHEUSER-BUSCH, INC.,
Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

BIGHAM ENGLAR JONES & HOUSTON
Of Counsel to Jayne & Gans
Attorneys for Appellant,
Anheuser-Busch, Inc.
99 John Street
New York, New York 10038

JURON & MINZER,
Attorneys for Plaintiff-Appellee
501 Fifth Avenue
New York, New York 10017

ROBERT M. PEET,
Attorney for Defendant and
Third Party Plaintiff-Appellee
466 Lexington Avenue
New York, New York 10017

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	Page
Docket Entries	A1
Trial Transcript	A4
Court's Charge	A337
Verdict	A371
Third-Party Defendant's Motion to Set Aside Verdict	A373
Opinion	A384
Judgment	A392
Notice of Appeal of Third-Party Defendant	A394

INDEX TO WITNESSES

PLAINTIFF'S:

MIKE J. BATCHKOWSKY	
Direct	A6
Cross	A58
Redirect	A117
Recross	A125
MURRAY BURTON	
Direct	A192
Cross	A219
Redirect	A256
Recross	A259

Index to Witnesses

Page

DEFENDANT'S:

JOSEPH P. PRYLE

Direct..... A145

Cross..... A160

JAMES F. O'KANE

Direct..... A169

Cross..... A173

EXCERPTS FROM DEPOSITION OF:

MIKE J. BATCHKOWSKY

Direct..... A274

HOWARD BALENSWEIG

Direct..... A289

Cross..... A298

Redirect..... A325

INDEX TO EXHIBITS

PLAINTIFF'S:

9--Letter Dated March 21, 1950..... A375

10--Letter Dated March 23, 1950..... A376

11--Letter Dated March 28, 1950..... A377

12--Letter Dated April 6, 1950..... A378

Index to Exhibits

Page

PLAINTIFF'S (Continued):

13--Supplemental Agreement Dated November 16, 1950..... A379

14--Letter Dated May 2, 1950..... A381

25--Earnings of Batchkowski and Rates of Pay..... A382

26--Absenteeism Record..... A383

DOCKET ENTRIES

BY CIVIL DEC

D STATES DISTRICT COURT

JUDGE GRIESA

Jury demand date: by pltff 2-28-69

JUDGE CONNER

No. 106 Rev.

TITLE OF CASE	ATTORNEYS
IKE J. BATCHKOWSKY vs. ENN CENTRAL COMPANY vs ANHEUSER-BUSCH, INC. 3rd party deft. 10-9-70	For plaintiff: JOSEPH G. MATERA JR., JURON & MINZNER 501 5th Ave. New York, N.Y. 10017 (697-8484) 3-24-75 For defendant: Thomas L. Smith ROBERT M. PEET 466 Lexington Ave. NY 10017 340-3109 (for deft. & 3rd-pty pltff) JAYNE & McNERNEY, ES 156 William St.-NYC 10038 (964-1600) (for third-pty deft.)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
nailed X	Clerk		2-28-69	J. MATERA		
			3-4-69	C.S. TREAS		
nailed ✓	Marshal					
Action:	Docket fee					
.A.						
),000.00	Witness fees					
urge at:	Depositions					

UNITED STATES DISTRICT COURT
FILED
APR 25 1975
DANIEL FUSARO, CLERK
SECOND CIRCUIT

Docket Entries

(Pg #2) JUDGE CONNER

DATE	PROCEEDINGS
Feb.28.69	Filed complaint and issued summons.
Mar.20.69	Filed summons and return Served PennCentral company by John T.Dunn on Mar.4.69
Mar.25-69	Filed ANSWER of Penn Central Co. to complaint, and interrogatories.
Nov.20-69	Filed Plaintiff's Interrogatories to Defendant.
Aug.24-70	Filed deft's affidavit & notice of motion-add party ret.9-8-70.
Aug.28-70	Filed deft's answers to pltff's interrogs.
Sep.8-70	Filed memo-endorsed on deft's motion filed 8-24-70: Motion granted, no opposition. Submit order. Lasker,J.
Sep.16-70	Filed order that leave is granted to deft. to make Anhuser-Busch, Inc. a party to this action. Clerk of this court shall issue the said summons under the seal of this court & cause said summons & 3rd pty complaint to be served upon the said third pty deft. Lasker J.
Filed 3rd party	
Oct.9-70	Filed 3rd party deft complaint issued summons
Nov.27-70	Filed pltff's affdvt. and notice of motion.Re: Compel Answers Ret. 12-17-70.
Nov.27-70	Filed pltff's Memorandum of law
Dec.11-70	Filed Summons with marshal's return;Served Anhauser-Bush Inc. by A.Ragone, on 12-7-70.
Jan.4-71	Filed 3rd party deft. ANSWER to Complaint and interrogs
Jan.7-71	Filed pltff's NOTE OF ISSUE and statement of readiness
Jan.25-71	Filed order pursuant to Cal. Rules 6 & 13-- Sugarman, Ch. J.
Jan.28-71	Filed Memo Endorsed on notice of motion filed 11-27-70--Motion withdrawn by stip. So Ordered: Bryan, J.
Jan.28-71	Filed stip and order that pltff's motion for discovery, etc., ret. 1-28-71, if hereby withdrawn. So Ordered: Bryan, J.
Mar.4-71	Filed Edward S. Minzner, Affirmation for pltff in opposition to the third party deft's motion to conduct an oral deposition of pltff.
Mar.4-71	Filed 3rd party deft. affdvt. and notice of motion Re:To take oral deposition of pltff.
Mar.4-71	Filed Memo Endorsed on notice of motion filed this date-- 9L Applicat denied on condition. So Ordered: Cannella, J. M/N
Mar.12-71	Filed order that 3rd party deft. motion is denied, Cannella, J. M/N
Apr.16-71	Filed deft. and 3rd party pltff. Requests For Admissions
Apr.16-71	Filed deft. and 3rd party pltff. answers to interrogs.
May 13-71	Filed 3rd party deft. designation of trial counsel
May 13-71	Filed 3rd party deft. Request for Admission to 3rd party pltff.
May 13-71	Filed 3rd party deft. answer to requests for admission to deft. 3rd party pltff.
Aug.10-71	Filed pltff's Designation of Trial Counsel
Oct 5-71	Filed Pre-Trial Order. McGohey J.
Oct 5-71	Filed deft & 3rd pty pltff's Pre-Trial Memorandum.
Oct 5-71	Filed Pre-Trial Memorandum of 3rd pty deft Anheuser Busch Inc.
Oct 5-71	Filed pltff's Pre-Trial Memorandum.
Jan. 21-75	Filed deft. & third-pty pltff s memorandum of law.
Jan. 21-75	Filed deft's requests to charge.
Jan. 27-75	Before CONNER, J. Jury trial begun.
Jan. 28-75	trial cont'd
Jan. 29-75	trial cont'd
Jan. 30-75	trial cont'd
Jan. 31-75	trial cont'd and concluded. Jury verdict for pltff. Decision by Court as to Penn Central-vs- Anheuser Busch, Inc. Pending.
Feb. 6-75	Filed third-pty defts supplemental trial brief.

A 3

Docket Entries

(PAGE # 3) CONNER, J.

DATE	PROCEEDINGS
2-26-75	Filed Opinion # 61952-- I accordingly conclude that Penn Central is entitled to full indemnification from Anheuser-Busch for the damages awarded to Batchkowsky and for the expenses of defending the action brought by him (but not the expenses of prosecuting the third-party claim, to the extent that the latter expenses can be segregated). Settle order on notice. CONNER, J. (m/n)
3-18-75	Filed Order & Judgment # 75, 236- ordered that thepltff. recover from the deft. & third-pty pltff., Penn Central Co., n/k/a Penn Central Transportation Co., the sum of $ 150,000. and his costs and disbursements of the action- that the deft. and third-pty pltff. recover from the third-pty deft, Anheuser-Busch, Inc., the sum of $150,000. together with the sums taxed as costs in favor of the pltff. against the deft. & third-pty pltff., and the expenses incurred by the said deft. and third-pty pltff in defending the action brought against it by the pltff. CONNER, J. Judgment entered 3-19-75 Clerk (m/n)
3-24-75	Filed third-pty deft. Anheuser- Busch, Inc. notice of appeal from Order and Judgment entered on 3-18-75. Copies to: Robert M. Peet, Esq. and Juron & Minzer. Entered -3-25-75
	Apr. 3-75 Filed Supersedeas bond in the sum of $166,750.00 for undertaking of appeal.
	Apr. 24-75 Filed transcript of record of proceedings dtd: Jan. 27-31-75.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk.

By _____
Deputy Clerk

C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

MIKE J. BATCHKOWSKY,

Plaintiff,

-against-

PENN CENTRAL COMPANY a/k/a
PENN CENTRAL TRANSPORTATION COMPANY, 69 Civ. 866

Defendant and
Third-party Plaintiff,

-against-

ANHEUSER-BUSCH, INC.,

Third-party Defendant.

----------x

Before:

HON. WILLIAM C. CONNER,

District Judge,
and a Jury of six.

New York, New York
January 27, 1975 - 10:00 a.m.

APPEARANCES:

MATERA, JURON & MINZER, ESQS.,
Attorneys for Plaintiff
BY: ALBERT A. JURON, ESQ.,
of Counsel

APPEARANCES (Continued):

ROBERT M. PEET, ESQ.,
Attorney for Defendant and
Third-party Plaintiff
BY: HENRY W. HERBERT, ESQ.,
of Counsel

JAYNE & McNERNEY, ESQS.,
Attorneys for Third-party Defendant
BY: WILLIAM C. GAUS, ESQ.,
of Counsel

- - -

(In the robing room.)

THE COURT: Did you want the reporter here?

MR. HERBERT: Yes, I did. I really have cleared up what I was about to say to the Court with Mr. Juron, I would want to put on the record I request the Court to request Mr. Juron to advise Mr. Batchkowsky, the plaintiff, that he is not to make any references to the fact he is on a disability pension throughout this trial in response to any question that might be asked. The fact of the disability pension is not admissible in FELA suits under the Eipel against New York Central Railroad case decided by the Supreme Court in the early '60's.

And Mr. Juron told me he has so advised client.

MR. JURON: I have instructed my client to make no mention to any form of pension or any form of

* * *

M I K E J . B A T C H K O W S K Y , the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JURON:

Q Mr. Batchkowsky, you are the plaintiff in this action, and you are suing the Pennsylvania Railroad, now known as the Penn Central Company, is that correct?

A That is correct.

Q When were you born, sir?

A March 3, 1915.

Q Are you married at the present time?

A Yes, sir.

Q How long have you been married?

A About 34 years.

Q Do you have any children?

A One.

Q Grandhildren?

A Two.

MR. HERBERT: Objection. Not relevant to this lawsuit.

THE COURT: Sustained.

Q Did there come a time some years back that you

became employed by the Pennsylvania Railroad Company?

A Yes.

Q What year was that?

A February 1951.

Q Prior to that time, what kind of work had you done?

A Well, I drove a truck, I worked for a carpet place. Various different jobs.

Q Were you in the military service during the Second World War?

A Yes.

Q At the time that you became employed by the Pennsylvania Railroad Company as it was then known in 1951, were you in good physical condition?

A Yes, sir.

Q Did you continue to work for the Railroad from 1951 through 1968?

A Yes, sir.

Q In 1968, what was your classification?

A I was a freight brakeman.

Q Could you briefly explain to the Court and jury generally what the job of a freight brakeman is, and after that explain what your job was in November of 1968. Firstly, generally, what does a freight brakeman do?

A Well, a freight brakeman helps the conductor out. He makes hitches -- in other words, he couples cars together, he relays signals, and if there is a brake on a car he takes it off.

Q By couples cars, you mean joins them together?

A Joins them together so they hold.

Q You made mention of a conductor. Is the conductor the brakeman's boss?

A That is correct.

Q What is the job of a conductor?

A The job of the conductor is to see that the train and everything is safe and in good condition, and see that all the work is done and his men are properly stationed, and so forth.

Q In connection with the movement of a number of cars which joined together is called a train, is there generally a third member to a crew known as an engine man or an engineer?

A That is correct.

Q If you will permit me to lead you at this point, is it the engineer who operates the locomotive?

A Right.

Q For how long before November of 1968 were you working as a freight brakeman? Was it since 1951?

A That is correct.

Q Did you have any difficulties, have any accidents, between 1951 and 1968 as a freight brakeman?

A No, sir.

Q Any problem doing that job?

A No, sir.

Q And would you say that in November of 1968, after having worked for 17 years at that job, that you knew the job of a freight brakeman?

A Pretty good, sir.

Q Some time around November 7 of 1968, did you go on the job at about 10:30 in the evenint?

A That is right.

Q Do you recall that particular evening when you started to work?

A Yes, sir.

Q Where was it that you reported for work?

A In Waverly Yard, Newark, New Jersey.

Q Prior to that time had you worked at that yard for a particular period?

A That is right.

Q Was it a matter of months or years that you worked there?

A On that particular job it was a matter of maybe

a couple of months, but I was in the yard longer than that, though.

Q I see. Now, when you started to work on November 7, 1968, your tour started 10:30 in the evening, is that right?

A That is right.

Q What time was it that the regular tour would have ended on November 8, 1968?

A 6:30 in the morning. A.M.

Q So the regular tour would be from November 7, 1968, 10:30 p.m. until 6:30 a.m. of November 8, 1968?

A Yes.

Q At 6:30 a.m. of November 8, 1968, were you still working?

A Yes, sir.

Q Did you put in overtime?

A Yes, sir.

Q At whose request was that?

A The company's.

Q At that time were you working with a particular crew?

A Yes, sir.

Q Had you been working since about 10:30 of the preceding evening with that crew?

A Yes, sir.

Q Do you recall the names of the members of the crew?

A Yes, sir. The conductor was Joe Pryle. The engine man was O'Kane. And we had another brakeman, he was a new man, he was only on the job a couple of days. I think it was Clifford Williams, something like that.

Q Had you ever worked with Mr. Pryle and Mr. O'Kane before that day?

A Yes, sir.

Q And to the best of your knowledge were they experienced men, too?

A Yes, sir.

Q Do you recall what the weather conditions were like some time between nine and ten o'clock in the morning on November 8, 1968?

A It was clear and dry.

Q And at that time between nine and ten o'clock that morning, do you recall where you were working?

A We were -- what time was that, sir?

Q Between nine and ten o'clock in the morning, November 8?

A Oh, yes. We were working in the plant itself, the Budweiser plant, Anheuser-Busch.

Q Had you ever worked at that plant before?

A Yes, on numerous occasions.

Q At the time that you were working, at that time had you received instructions from the conductor or someone else as to what you were to do at that time?

A I only received instructions from the conductor, because he is my boss.

Q That is Mr. Pryle?

A Mr. Pryle, yes, sir.

Q What did Mr. Pryle tell you to do?

A Well, at the beginning --

MR. HERBERT: Speaking now of November 8, 1968, is that correct?

MR. JURON: Yes, between nine and ten o'clock in the morning.

MR. HERBERT: Thank you.

A He generally goes into the office of the plant and he gets like what they call a drill slip, and they need certain cars for certain tracks.

Q By drill slip can you tell us what you mean?

A Say there is five cars on one particular track and the company wants only one of them. We have to shift that one car out, put it on the side, and put the rest of the cars back. Then we pick up that one car we

have and we do that with nowever more cars they need, four or five, and we do the same thing. Then we get them all together and we either push them, it all depends on how the engine is facing, we either push them or shove them into the plant.

Q You say "we."

Can you explain to us how the operation is? The usual operation of the crew in moving such a train of cars, what does the conductor do, what do you do as brakeman, and what does the engineer do?

A Well, like the conductor would make the hitch. In other words, he would make the coupling to that car, or two cars, whatever it was. And give us a signal, and me and the engineer would back up, go past a certain switch, go on a different track, and then the conductor would be inside the plant.

Now, at this particular time we had to go on the track what they call B-9.

Q We will get to that in a moment. You say "we."

The actual physical movement of the locomotive, is that done by the engineer alone?

He is the only one that operates the motor of the engine?

A Yes, sir, he operates the engine, yes.

Q Is it the usual thing for you to relay a signal from the conductor to the engineer?

A Yes.

MR. GAUS: I object to the leading questions.

THE COURT: Yes, sustained.

MR. JURON: Very well.

Q Now, when there is the usual movement of a train, which is a group of cars, and the crew consists of a conductor, a brakeman, and the engineer, while the train is moving where would the brakeman be?

A The brakeman would be on the ladder, the side ladder of the front car, going into the plant.

Q You say side ladder. Is that up against the car itself?

A Yes, it is attached to the car. It is on the side of the car, the front part of the car.

Q By car, you mean a freight car?

A A freight car, yes.

Q Incidentally, do freight cars come in various sizes?

A They come in 40, 50, various sizes and various lengths, various shapes, and everything.

Q Do they come in various widths as well, or conventional weights?

A The widths are more or less standard.

Q What would the conventional width be?

A I really don't know the width.

Q In your years as a brakeman, was it your practice as well as the practice of other brakemen to ride on the side ladder of a lead car of a train while relaying signals from the conductor to the engineer?

A That is normal procedure.

Q Is that the procedure that the Railroad instructs its brakemen to follow?

A That is correct.

Q Do they follow that procedure?

A Yes, sir.

Q Were you familiar with this place you called B-9 before November 8, 1968?

A Yes, sir.

Q Can you tell us what B-9 is?

A It is a track -- they have ten different tracks and they are numbered from 1 to 10, and the B designates Budweiser, so B-9 is the Budweiser track leading into number track 9.

Q Does that track go directly into the building?

A It goes, yes, into the building, yes.

Q And where does the track come off?

A It comes off from the outside in what they have a yard like, and that is where they have a lot of cars, different tracks, you know, and different switches and curves, and that is how you shove them into there.

Q Now, a portion of B-9 you say is inside a building of the Budweiser plant. Is that correct?

A That is right.

Q Do you have any idea as to how deep the track ran inside the building? And we are speaking of B-9. How deep was that track inside that building on November 8, 1968?

A Well, it would hold about six average cars.

Q About how many feet would that be?

A About 40 feet a car. Some cars are 50, some are 60, some are 70. But on the average it will hold about six 40-foot cars.

Q You say you had worked at this place B-9 before November 8, 1968?

A Yes, sir.

Q Were you familiar with the area?

A Yes, sir.

Q Was there anything unusual, to your eye and to your senses, with respect to B-9 as opposed to those sidings that you usually worked at?

A There definitely was.

Q What was there different about this siding?

A Well, two big signs outside, I don't know if it was black on white or red or whatever it was, and it says "Close clearance. Man will not clear platform."

Q Can you explain what that meant?

A In other words, you cannot ride on the side of the car on the ladder.

Q On all the other sidings as a train of cars would move into a building, would you as brakeman be riding the side ladder of the car?

MR. GAUS: I object to this as speculative, if your Honor please. We are talking about a particular area.

THE COURT: The question ought to be limited to what his normal practice was.

MR. JURON: Yes, sir. I will limit it to that.

MR. HERBERT: At other sidings?

MR. JURON: Yes.

Q On other sidings outside of the Budweiser plant, was it your practice as brakeman to ride the side ladder of the lead car into the building?

A Yes, sir.

Q Now, Mr. Batchkowsky, I will show you a

photograph marked Plaintiff's Exhibit 1, and ask you if this is a fair representation of the doorway entrance or the entrance way to B-9 looking from the exterior in, as it existed on November 8, 1968?

A Yes, sir.

MR. HERBERT: No objection, your Honor.

MR. GAUS: No objection.

(Plaintiff's Exhibit 1 received in evidence.)

MR. JURON: I have a series of photographs. Would the Court entertain a motion to allow the jury to see them preferably one at a time rather than all at one time?

THE COURT: Either way.

MR. JURON: If you would allow them to see them one at a time, perhaps it would clarify where they were taken.

(Exhibit handed to the jury.)

THE COURT: How many photographs have you?

MR. JURON: I have six, your Honor.

THE COURT: I wonder if it wouldn't expedite matters if instead of waiting for one photograph to be completely circulated, if you go ahead and have the testimony about all, and then make a note on the blackboard as to where the photographs were taken, if

that is agreeable with counsel. Then all the photographs can be circulating at the same time.

MR. JURON: I have already identified them. If counsel will agree upon what they describe it will be okay.

(Pause.)

MR. JURON: Excuse us, your Honor, we are working some arrangement out.

THE COURT: All right. Good.

(Pause.)

THE COURT: I take it counsel are agreeable to stipulate that Plaintiff's Exhibits 1 through 6 are photographs of the structure adjacent to track B-9 as it existed on November 8, 1968, the photographs being taken from positions which will be indicated on the blackboard.

MR. JURON: Yes, your Honor.

MR. HERBERT: That is agreed.

MR. GAJS: Yes.

THE COURT: Will you mark these.

(Plaintiff Exhibits 2 through 6 received in evidence.)

THE COURT: While they are being circulated to the jury, you can mark on the blackboard the locations

reflected in each of the photographs.

You don't have to use the word "view."

(Mr. Juron wrote on the blackboard as follows:

"1. Exterior facing interior showing sign and car by platform.

2. Interior facing interior showing car by platform with overlay.

3. Interior facing platform from doorway to extension of platform with overlay.

4. Interior showing part of exterior doorway, platform and track.

5. Interior showing full doorway, track, front and edge of platform.

6. Same as "V" with overlay showing track and interior width and curve in track.")

THE COURT: I take it counsel also stipulate that the dimensions marked on the overlays are the correct dimensions in feet and inches?

MR. HERBERT: If there is a variance, your Honor, it would be minimal, maybe a matter of an inch or so.

MR. GAUS: There are drawings which cover the situation which I have already called your Honor's attention to, but insofar as the overlays, I am prepared

to stipulate that they are in substantial agreement with the situation as depicted in the photographs.

BY MR. JURON:

Q Now, Mr. Batchkowsky, I am going to direct your attention to November 8, 1968, in the morning in the area just outside of B-9 of the Anheuser-Busch brewery in Newark, New Jersey.

About what time was it that you and the other members of the crew started to work at that track which you have called B-9?

A A little before 9:45.

Q At that time was there a train of cars that had been made up?

A Yes, sir.

Q How many cars did that train consist of?

A About four or five, including the locomotive.

Q Where were those cars obtained?

A Well, there was one or two from the yard, and one or two from the different tracks adjoining B-9.

Q And by other tracks adjoining B-9, were those tracks of the Railroad or tracks of the Anheuser-Busch Company?

A Anheuser-Busch Company.

MR. GAUS: I will object. He is asking for a

conclusion by this witness that I don't think this witness is capable of drawing.

MR. JURON: I will withdraw the question. Mr. Gaus is right.

Q The other tracks you mentioned, can you describe where they are?

A They were outside the plant. They have their own yard there.

Q By they you mean who?

A Anheuser-Busch.

Q How many cars were picked up from these tracks which were inside of the Anheuser-Busch plant?

A Either two or three, I don't remember the exact figure.

Q After the train was made up did the engine or locomotive push or pull the freight cars?

A It pushed them into the track.

Q And was the locomotive or engine at the rear of this train of freight cars?

A It was at the rear.

Q And was the front end of the engine facing the cars in front of it, or was it backing it into it?

A It was backing it in, shoving it in. Backing it in.

Q So that the front end of the engine was facing the opposite direction from which the trains were going or was it the other way around?

A The front of the engine was facing the other way.

Q The opposite direction the trains were going?

A That is right.

Q In the direction that the trains were being pushed, and facing the direction that the train was being pushed, was the engineer on the left side or the right side?

A He was on the left side of the engine.

Q At the time that the train of cars was being pushed, was it being pushed into B-9?

A That is correct.

Q At that time can you tell us where the conductor was standing?

A He was standing inside the plant on a platform near the first car that was already in there to make the hitch, the coupling.

Q Can you tell us approximately how far into the building the first car was? And by first car -- I withdraw that question. You say first car. Was there a car inside of the building already?

A There was one car inside all the way down near

the end of the block.

Q That car was separate and apart from the train of cars that you have just described, is that correct?

A That is right.

Q Was anyone working on that car?

A Well, they generally work on it, but when the conductor comes over and tells them we are putting cars in there, so they get out.

MR. GAUS: I object as not responsive to the question.

MR. JURON: I will stipulate to that.

Q Was anyone loading or unloading anything from this other car that was inside the building?

A That I wouldn't know for a fact.

Q Can you give us your best recollection or estimate as to how far inside the building this other car was?

A It was against the block.

Q Is that the end of the track?

A The end of the track inside, all the way inside against the block.

Q About how far would that be from the entrance way?

A About five car lengths. About 200 feet.

Q And where was the conductor with respect to this car?

A He was standing right opposite that car inside on the platform.

Q I show you Plaintiff's Exhibit 2 in evidence, which portrays a car. Is that the approximate place where this car was that you say was already inside the building?

A Yes, sir.

Q I am showing you Plaintiff's Exhibit 2 in evidence. Can you see on this photograph the place where you say the conductor was standing?

A Down here opposite the car.

MR. JURON: May I have the Court's permission to mark the photograph?

THE COURT: You may. Do you want to mark the overlay or the photograph?

MR. JURON: I don't know.

THE COURT: Why don't you mark the overlay.

MR. JURON: Very well. May I use a C for the conductor?

THE COURT: All right.

Q On this overlay, will you mark a C at the place where the conductor was, and put a circle around it, if

you would. (Indicated.)

Q At the time the conductor was standing there, can you see on this photograph, which is Exhibit 2 in evidence, the place where you were standing?

A Yes, sir.

Q Would you please mark with an X mark on the floor of that photograph where your feet were standing at that time?.

(Witness indicated.)

Q Did you continue to stand at that place all during the time?

A Yes, sir.

Q I show you Plaintiff's Exhibit 6 in evidence. Does this photograph show you the track that was being used by the train as it came about into B-9?

A That is the track here.

Q Does it show the place outside the building, the particular track that was used by the train outside of the building before entering the building?

A It came off this siding up to the switch and then it went into there (indicating).

Q Could you show with an arrow the direction it went to the switch, using the head of the arrow for the direction, and then after making the switch the direction

it went as it started entering the building?

(Witness indicated.)

Q Could you mark with an S where the switch is? Can you see the switch there, or can't you?

A It is around here somewhere, around the barrels.

(Witness indicated.)

Q Put a circle around the S for switch.

(Witness indicated.)

THE COURT: You may show them to the jury.

MR. JURON: To recapitulate, C indicates where the conductor was standing, and X indicates the place where Mr. Batchkowsky's feet were touching the floor.

If I may recapitulate on 6, the arrow head shows the direction the train was going when it reached the switch, which is marked S, and then the arrow shows the direction it was going as it entered the building.

THE COURT: You might mark the first arrow number one and the second arrow number two, because there are two arrows.

MR. JURON: Yes, sir.

(Exhibit marked.)

Q Now, Mr. Batchkowsky, did you see the train come off the switch?

A Yes, sir.

Q And did you see the train start to move into the building?

A Yes, sir.

Q At what time in what direction were you facing?

A When the train was outside I was facing the engineer. When it started coming inside, then I had to face the conductor to see his signals and relay them.

Q And when was it that you turned from looking outside towards the engineer on the locomotive and turned around and started to face the conductor? Where was the train at that time?

A There is a little road over there for automobiles crossing. Cars go down every once in a while. As soon as there was no cars and the engine came, then I went inside.'

Q From that time on did you continue to watch the conductor,facing the conductor looking towards the interior of the building until something happened?

A Yes, sir.

Q At the time you were inside the building and at the time you started to face and continued to face the conductor, was any part of your body up against the wall of the platform which was on your left as you are facing inside the building?

A No, sir.

Q Can you explain where you were standing at that time and the reason why you were standing away from the platform at that time?

A To see the engineer and so he could see my signal.

Q If you stood with any part of your body up against the wall of the platform, could you see the conductor?

A The conductor, yes.

Q Could the engineer see you if any part of your body was up against the platform?

A No, sir.

Q And can you explain why?

A Well, there is between the door and the side of a car, I don't know, about a foot, a foot and a half, I don't know what the clearance is, and there is a little turn if you notice it there, that the engineer cannot possibly see me.

Q At the time that you were facing the conductor, relaying the signals to the engineer, about how far from the wall of the platform was your left side?

A My left side, about a foot, I guess.

Q Can you tell us the manner in which you relayed

the signals from the conductor that you were facing to the engineer behind you?

A You are the conductor. I am watching you. The engineer is behind him. So I am just relaying the signals from you back to the engineer.

Q Did you turn around to face the engineer doing that?

A Once in a while you have to see if he is in sight because there is a turn there, and if he is out of sight what is the sense of passing signals?

Q Once he made the turn from the switch -- and I take it that is the switch that is visualized on Exhibit 6 -- did you turn back to look at the engineer?

A At what time was that?

Q After the engineer came around the switch and started entering the building.

A Yes, sir.

Q Did you at any time turn around to take a look at the engineer?

A Just once or twice until the cars got into the building.

Q Did you have anything in your hand to signal to the engineer?

A Yes, you get a piece of paper, any kind of

newspaper, anything that is wide, so the engineer can see.

Q And as the train started to move into B-9, about how fast was it going?

A It was going the regular normal coupling speed which is about four miles an hour.

Q All during this time you were watching the conductor and you were continuing to signal to the engineer?

A That is right.

Q What kind of signal were you receiving from the conductor and what kind of signal were you relaying to the engineer?

A He was giving me a go ahead signal and I relayed the go ahead signal to the engineer.

Q By go ahead you mean continue moving the train?

A Continue moving, yes.

Q You are a fairly tall fellow. About how tall are you?

A 6' 3".

Q Was there anyone on the platform near you at that time?

A Well, the plant foreman was about two or three feet behind me.

Q On the platform?

A On the platform. He was sitting in one of them scooters like, you know, where they pick up --

Q A fork lift?

A A fork lift, yes.

Q You also mentioned that there was another brakeman, Williams. Do you know where he was?

A He was on the engine somewhere, near the engine. He was a new man.

Q He was on the train?

A On the engine, not on the cars, no.

Q I see. Now, during the time that you were watching the conductor, did you notice any of the cars pass you on the track on your right?

A Yes, about two or three cars.

Q And at that time was the train still going at about four miles an hour?

A Yes, sir.

Q And at that time where were you still facing?

A I was facing the conductor.

THE COURT: Mr. Juron, unless this is a bad place to stop I suggest we take our noon break here.

MR. JURON: All right, sir.

THE COURT: We will take our noon recess until

two o'clock.

Don't discuss the case with your fellow jurors or anyone else until you finally go back to the jury room for your deliberations.

- - -

AFTERNOON SESSION

2:10 p.m.

(In the robing room.)

MR. HERBERT: Your Honor, Mr. Juron and I were discussing, I guess in anticipation of what my cross examination might be, and Mr. Juron asked me if I was going to ask any questions of Mr. Batchkowsky concerning a subsequent accident he had, and I said yes, I intended to.

Mr. Juron said that he would like to come in to speak with you concerning this propriety of allowing me to cross examine him on a subsequent accident.

MR. JURON: There was a subsequent accident I believe in 1970, at which time he was a passenger in a bus and he injured the inside of his mouth when certain dentures broke, and he also injured either his left wrist and hand or his right wrist and hand, and Mr. Herbert indicates it may have been his forearm as well, and it could conceivably have been his forearm.

I did review this morning very carefully that file, and I find that there was no claim ever made or any indication in the hospital or medical records of that accident as to any injuries to his neck or shoulders or his head, except for the inside of his mouth, and I

feel that any testimony that may be adduced on cross examination with respect to such unrelated accident, in view of the fact that it doesn't relate to any of the parts of the body that were injured in this accident, would be prejudicial to the plaintiff, and I felt we should have a ruling on it.

THE COURT: The second accident took place in 1970?

MR. JURON: Yes, sir.

THE COURT: Has he worked since that time?

MR. JURON: Yes, sir. As a matter of fact, the accident happened on his way from work, and he was out, as I recall, for a few months as a result of the injuries to his mouth, and then he went back to work after that. There were no claims of any residuals there.

MR. HERBERT: I think the facts will show there were claims of permanent injury as a result of that injury, your Honor.

MR. JURON: Forgive me, no claim of injury to any parts of the body here.

THE COURT: As long as he is claiming some permanent disability as a result of the injury to his mouth, I think that is admissible to show that his present permanent disability is due at least in part to the

injury to his mouth and not to the injury to his neck and shoulder.

MR. JURON: But there were no claims, no injuries, no pains, to neck or shoulders.

THE COURT: That doesn't make any difference. For example, if in 1968 I got an injury to my neck and shoulder and I go back to work and in 1970 I get an injury to my head and I claim a partial permanent disability as a result of the injury to my head, I should think that is admissible to show that my permanent disability is not contributable entirely to the injury sustained in 1968.

If he had not ever claimed any permanent disability as a result of the 1970 injury, I think you would be absolutely right.

MR. JURON: I really don't recall. You have the file on that?

MR. HERBERT: I have, your Honor, certified from the Eastern District Court, where that action was tried, copies of interrogatories propounded by the defendant in that lawsuit, and the plaintiff's certified answers to those interrogatories.

MR. JURON: I tried that case, but quite frankly I don't recall that aspect of it. If Mr. Herbert would

show me what he has perhaps we can work something out.

THE COURT: All right.

MR. JURON: In other words, your Honor, your thought is that if there was any blow to his head, it could have conceivably affected to some extent his neck and shoulders?

THE COURT: No. It could have affected his ability to continue work, and so that we couldn't conclude that the 1968 injury is the sole competent cause of his inability to work.

MR. JURON: On that, I think the interrogatories would show that as a result of the 1970 accident he was out I think at most for three months, because of the problems to his mouth, until he got new dentures. Then he returned to work with no further loss of time as a result.

THE COURT: That doesn't make any difference. The question is whether or not he ever claimed any continuing disability as a result of the 1970 injury. Not whether he was able to continue work, but whether or not he made any claim of partial disability as a result of the 1970 accident.

MR. GAUS: In support of what your Honor just said, in the instant case, taking the 1970 accident out

of the picture, in the instant case, where there was an interruption of work and he went back to work, and now he is making claim for disability which he is attributing to this accident. I think there is support for the situation that we find ourselves in here.

THE COURT: Yes, I think the situation is the same. People often go back to work even though they make a claim of partial disability, which he is doing on account of the 1968 accident.

MR. JURON: Could we have a moment to check with Mr. Herbert's papers; or shall we leave it for later on?

THE COURT: It ought to be done some time before he is cross examined, because I assume Mr. Herbert is going into that on the cross examination.

MR. HERBERT: I have to, your Honor, yes.

THE COURT: How much more direct are you going to have?

MR. JURON: About fifteen minutes.

THE COURT: Show him what you have, if you will, Mr. Herbert, before we get started again.

(In open court. 2:15 p.m.)

(Jury present.)

CONTINUED DIRECT EXAMINATION

BY MR. JURON:

Q Did any of the cars come alongside the platform at that time?

THE COURT: He has covered that. Two or threr cars had passed him.

Q Do you recall how much the space was between the edge of the platform and the side of the car as it came alongside the platform?

A About 4 inches.

Q Incidentally, you told us that you were 6 foot 3 inches tall. About how much did you weigh at that time?

A About 220, 225.

Q Did something happen as the train was passing you on the right and as you were facing the conductor? Did something happen to you?

A Yes, sir.

Q Can you describe to the Court and jury what happened?

A Well, the cars are coming this way, I am facing the conductor that way, and either the third or

fourth car, there is two handles protruding from the freight car, so one handle hit me in the back and turned me around, and as I was going down the second handle hit me in the forehead and cut me open over here. I fell down to the ground and I rolled. I was in a shock, in a coma, and then they picked me up on the platform, laid me down, and then they took me to the yard master's office and he drove me with his car to the Elizabeth General Hospital, where they gave me treatment.

Q Did you see the door handle before the accident happened?

A No, sir.

Q After the door or door handle struck you, were you conscious or unconscious?

A I was conscious, but I was in shock.

Q When was it you saw the door handles which you say struck you?

A You mean after they hit me?

Q Was it then you saw the door handles?

A Yes, sir.

Q When you went to the ground were you bleeding from any part of your body?

A Yes, my whole head was open here.

Q Did you feel any pain at that time?

A No, sir.

Q When you were taken to the hospital, which hospital was that?

A Elizabeth General Hospital.

Q Who took you there? How did you get there?

A The train master, the yard master, he is the boss of the yard, he drove me there.

Q When you got to the hospital did you receive any treatment there?

A Yes, sir.

Q What did they do for you?

A Well, they put something on my back, I don't know, and then they gave me a couple of shots in each arm.

Q And put some stitches in your head?

A Yes, they put stitches in my forehead.

Q How long were you at the hospital?

A A few hours.

Q And after that where did you go?

A They drove me back to the yard and I changed into my street clothes, and then I went home. Somebody drove me home.

Q How did you feel then?

A Well, I was numb, but I didn't have no actual

pain.

Q Did there come a time some time after that that you started to feel some pain?

A Yes, sir.

Q How long after that?

A About two, three days.

Q Where did you feel pain?

A Well, I started to get a lot of throbbing in the head, and in my neck, and I was getting dizzy.

Q During those couple of days after the accident, were you working or were you home or some place else?

A After the accident?

Q Yes.

A I was home.

Q Did you return to the Elizabeth General Hospital at any time after the accident?

A No, sir.

Q Did you receive any medical attention or medical care during those two or three or four days after the accident?

A Yes, I went down to the Medical Office of the Penn Central Railroad.

Q Where is that located?

A On 33d Street and Eighth Avenue. And the

head doctor, I forgot his name, he looked at -- he took the bandage off, looked at me, and put a new bandage on, and told me to come back in a week, and I came back in a week later.

Q Did he take a look at you at that time?

A Yes. Then I come back a week later, he took another look, and he took the stitches out, and covered it up again, and I said I would like to go back to work. He says "I can't give you no slip to go back to work." He says, "You have to go to your own private doctor, and he has to give you a note saying that it is all right for you to go back to work." In other words, he is not responsible, the medical doctor in Penn Station, he wanted my own personal physician to give me a note.

MR. GAUSS: I object to what the medical doctor of the Pennsylvania Railroad wanted in this case.

THE COURT: Only testify to what he said, not what he had in his mind.

Q What did he tell you to do?

A The medical doctor?

Q Yes.

A He told me to see my own personal physician.

Q How did you feel at that time?

A I started to get a lot of pain, and it was starting to hurt me.

Q Did you see your own doctor?

A Yes, sir.

Q Did he do anything for you?

A Yes, sir.

Q What did he do?

A He gave me shots in the arm and the neck, and he gave me a couple of jars of pain killers, and he gave me a can of spray of some kind to deaden the pain, to neutralize it, and he told me to come back next week.

Q Did he give you a note to go back to work?

A No, sir.

Q Did he indicate to you when you would be able to return to work at that time?

A No, sir.

Q What was the name of this doctor?

A Dr. Murray Burton.

Q Where was he located?

A He was located on Park Avenue, then he moved to 4 East 88 Street, New York.

Q Had you ever seen this doctor before this accident?

A No, sir.

Q Did you have a family doctor at that time?

A Yes, sir.

Q Did you see him before you saw Dr. Burton?

A I stopped in, and explained to him I got hurt, and he said "you better go to see a specialist."

Q During the time that you were being treated by Dr. Burton, were you at home or were you working?

A I was at home.

Q And for how long after the accident did you stay at home?

A Approximately seven months.

Q Did Dr. Burton prescribe any kind of apparatus for you to wear?

A Yes, I forgot about that. He gave me a -- he sent a man down to my house, a surgical appliance man, and he fitted me for one of them big collars to put around my neck.

Q Did you wear that for a time?

A Yes, sir, quite a while, for about a year or so.

Q After removing it, which you say was about a year after the accident --

A Approximately, yes.

Q Have you worn it at any time since?

A Whenever I get pains and it helps me, I put that on.

Q Does it help?

A Yes, sir.

Q When was the last time you wore that collar?

A Oh, about a month ago, I forgot the exact date, it was cold and rainy, so I had to put it on.

Q When you first came under the treatment of Dr. Burton, about how often did you see him?

A When I first seen him I had to see him every week.

Q On the occasions that you saw him at that time every week, what kind of treatment would he give you?

A He used to give me shots in the arm, to the shoulder, and the neck.

Q Did it help?

A Yes, sir. In other words, it more or less would deaden the pain for about four or five days.

Q Where were you having pain at that time, during the time that you were being seen by Dr. Burton?

A Pains?

Q Where were the pains?

A My neck, my shoulders and the headaches.

Q Did you have any difficulty moving your neck

about, your head about, at that time?

A I had a limited range, like, you know. I couldn't move it all the way around.

Q Did you have any pain to any other part of your body except for your neck and head?

A Yes. My back.

Q Whereabouts in your back?

A Right in the back here.

Q Did he do anything for that part of your body?

A He took x-rays and said it was a broken rib or a splintered rib or something like that.

Q Did that pain clear up?

A No, sir. It doesn't bother me, excuse me, except when I get in a certain position. Now even if I wanted to get in that position it wouldn't bother me, just by accident I couldn't put myself in that position, but I get a certain twinge every time I get in that position.

Q For how long did you see Dr. Burton about once a week?

A Oh, about four, five, six months.

Q After that, did you continue to see him?

A Yes, I continued seeing him every two weeks, and then every month.

Q On each of these occasions did he give you treatment?

A Yes, sir.

Q When was the last time you saw Dr. Burton for treatment?

A About six months ago.

Q And all told, from the time that you first saw him for treatment until the time that you say you saw him last for treatment about six months ago, about how many times did you see him?

A I would say approximately about 40 times, give or take a few, you know.

Q You were examined by him last week for the purpose of seeing what your condition was, is that correct?

A That is correct.

Q And that was the same day that you were examined by Dr. Balensweig, the physician appointed by the Railroad to examine you, you recall that?

A Yes, sir.

Q But he gave you no treatment, as I recall, at that time, isn't that right?

A No, he just gave me an examination, that is all.

Q When was it after this accident that you

returned to work?

A About seven, eight months.

Q And when you returned to work did you resume doing the same kind of work that you had been doing before the accident?

A Not exactly.

Q Will you tell us in what respects it was different?

A Well, I returned to work as a brakeman, and they had different classifications, categories. If you have the seniority, or if you get hurt or something, they will either make you pull what they call a pin separating the cars, and the brakeman will ride it down the hill. Or else they give you a chalk and you mark the side of a car and you look at your slip, and you mark on the side of the car the destination of that car. But it all comes under the category of brakeman.

Q When you returned to work, did you resume climbing up and down the ladders of the railroad cars?

A No, sir.

Q Was there anything at that time that you were unable to do that you were able to do before the accident, besides being unable to go up and down the ladders?

A I couldn't hold onto the side of the car with

one hand and pass signals.

Q Can you explain why not?

A Well, I couldn't turn my neck. And I couldn't jump from one car to another car on top for the same reason. And I couldn't cross any tracks because where they let these cars what they call them windy, they let them fly loose. They give them a little shot and the cars ride in, and it is dark there, some times you can't see nothing, so you can't turn your neck to see if the cars are coming or not, and it is very unsafe, you know.

Q During this time were you still under treatment medically?

A Yes, sir.

Q When you returned to work as you say some seven months after the accident did you continue to work on a regular ba is?

A No, sir. I would work, well if it was nice weather I would work maybe five days, a week, but if it rained or snowed I just couldn't make it because it is very slippery and my neck used to bother me, hurt me, and I couldn't work. In other words, I worked on and off. It varied.

Q Before this accident, before November 8, 1968,

did you work regularly or on and off?

A I worked regularly seventeen years.

Q You say after seven months you returned to work and you worked on and off. Did there come a time after that that you were out for a further period completely?

A Oh, yes, about -- I think it was 1970, I am not sure.

Q What happened then?

A I was coming home from work, I think it was a Saturday night, it was about one o'clock in the morning, and I was on a Port Authority bus, and as it pulled into the Port Authority terminal on 40th Street and Eighth Avenue the bus crashed, so I got a cut on my mouth and my teeth broke and I had a sprained wrist, and I stayed out for a couple of months on account of that accident.

Q You say your teeth broke. Were they natural teeth or artificial teeth?

A Artificial.

Q Did you have any problem with your mouth after that?

A For a little while until the sore healed, you know.

Q Did you have a problem with your wrist for a time after that?

A For a little while.

Q Did that prevent you from working for a time?

A Yes, sir.

Q Incidentally, do you have any problem with your mouth and your wrist now?

A No, sir. I have new false teeth.

Q After this incident in 1970 with the bus, did you once more go back to work?

A Yes, sir.

Q How did your neck feel at that time? This is in 1970, some two years or more than two years after the accident of 1968.

A Well, it started getting progressively worse, it was hurting more and more, and I worked a while, I took off a while. Then when I visited Dr. Burton again he told me, "You are going to get progressively worse, I advise you to quit."

Q Did you have any problem at that time moving your head or neck around?

A At what time?

Q When you returned at the end of 1970 to work, 1971, did you have any problem with respect to moving your head at that time?

A A little bit, you know. Not as much as now.

Q You mean it is worse now?

A Yes, sir.

Q How does your neck feel now? What are you unable to do with your neck now?

A I just can't move it. I can't cross the street, I have got to move my whole body. I used to drive a truck or a car or a cab. I can't get a license no more, they deprived me out of that because I might kill myself or hurt somebody.

MR. GAUS: I object to this, if your Honor please, the reasons.

MR. HERBERT: I will join in that objection, your Honor.

THE COURT: You don't object to his statement that he can't get a driver's license now?

MR. HERBERT: I will object to the conclusion, your Honor.

MR. JURON: I will stipulate to withdraw it, your Honor.

Q Let me ask you this, Mr. Batchkowsky. I think you told us this morning before working for the Railroad you worked as a truck driver.

A Yes, sir.

Q And you had a license?

A Yes, sir.

Q Was that a chauffeur's license?

A Yes, sir.

Q At the time of this accident in 1968, did you have your own car?

A Yes, sir.

Q Did there come a time when your chauffeur's license came up for renewal?

A Yes, sir.

Q In its usual course?

A Right.

Q Was your chauffeur's license renewed?

A No, sir.

Q Did you make an application for renewal?

A Yes, sir.

Q And was it renewed?

A No, sir. They asked me, is there any --

MR. GAUS: I object to any voluntary statement beyond the answers he has already given, which I submit to the Court has answered the question put to him.

THE COURT: Sustained.

Q At that time did you have a complete range of movement of your neck?

A At what time?

Q At the time your chauffeur's license came up for renewal?

A No, sir.

Q Can you show to the Court and jury how far you can move your head now to the right and how far you can move it to the left?

(Witnesses indicated.)

Q If you move any further than that -- can you do so?

A I can't. It hurts and it cracks. I went up to see that Ballantine, he tried to move it, he couldn't move it.

Q You mean Dr. Balensweig, the Railroad doctor?

A The Railroad doctor, yes.

Q Did you ever have this difficulty before the accident to any extent?

A No, sir.

Q Did there come a time when you were no longer able to work for the Railroad?

A Yes, sir.

Q About when was that?

A About two years ago.

Q Since that time have you worked at anything?

A Nothing at all. I could -- if I wasn't hurt

I could have done a lot of work.

Q Did you look for any kind of work?

A Yes, sir. I could have been a construction truck driver, anything, but I just couldn't do it. They wouldn't hire me.

Q Do you own your own home?

A Yes, sir.

Q Did you own your own home before 1968?

A Yes, sir.

Q Before 1968, and I mean before the accident, did you do work around the house, repair work?

A Yes. I built a couple of extra rooms, I did a lot of work around the house. Today I can't even paint it.

Q Do you do anything around the house?

A Now? I take care of the grandchildren.

Q Do you do any repair work around the house?

A No.

Q Who does for you?

A I have to hire people to do it.

Q Do you still have your car?

A No, sir.

Q What happened to your car?

A It is no good without a license, so I got

Q Since the accident of November 8, 1968, with the exception of this one incident when you were a passenger in a bus and you had your teeth broken and your mouth cut, did you have any other accident to any part of your body?

A No, sir.

Q Did you have any disease or any difficulties since November 8, 1968, except for the problems which started November 8, 1968?

A No, sir.

Q And before November 8, 1968, were you in good physical condition?

A Yes, sir.

Q Did you have any problem doing any of the jobs of the brakeman?

A No, sir.

MR. JURON: I have no further questions. You may enquire.

CROSS EXAMINATION

BY MR. HERBERT:

Q Mr. Batchkowsky, you told us it was the custom and practice of you crew men to ride the cars when going into an industrial plant?

A Yes, sir.

Q Have you switched any of the plants on the tour, on that same tour, prior to your accident?

A Yes, sir.

Q When you switched those plants, did you ride into those plants hanging from the side of a ladder?

A Yes, sir.

Q When you ride in on the equipment on the side ladder, are you able to pass signals from that position?

A If it is on a straight track, yes.

Q Your accident happened as you were switching cars into what you told us, described as being track B-9?

A That is correct.

Q And you had pulled some cars from, where do you say B-8 or B-6?

A One of the tracks. I don't remember. It is one of the tracks next to it, or the track before, something like that. We got a couple of cars from the tracks inside and a couple of cars from the tracks outside

Q And you had to pull them out to that switch?

A Yes, sir.

Q Once the switch was thrown you moved them back on B-9, is that correct?

A Right.

Q Is there a road crossing there just outside the entrance to that plant?

A Yes, sir. Automobiles pass.

Q Did the moves stop at that automobile crossing?

A Yes, to make sure there are no cars coming.

Q After you threw the switch to go in on track B-9, did you ride the equipment in as far as the automobile crossing?

A That is correct.

Q That was the point where you got off?

A Yes, sir.

Q When you got off you walked into the plant, is that right?

A Yes, sir.

Q Where was your conductor then?

A He was on the platform next to the car that was in there waiting to make the hitch in the coupling.

Q Did your conductor give you any -- once you got inside the plant, did your conductor give you any

signal to start the movement into this plant?

A Yes, sir.

Q Where were you when you received that signal from the conductor?

A There is a little recess there between the outside door and the platform which is about two feet wide, and I was standing right there.

Q Did you pass that signal on to your engine man?

A Yes, sir.

Q Were you all operating from the left hand side as you were moving in?

A Yes, sir.

Q At the time of your accident was your back in the direction of the engine man?

A That is correct.

Q And you were facing inside the plant?

A Facing the conductor, yes, sir.

Q Before you moved these cars in on track B-9 did you check the doors on those cars?

A It is not my job to check them. I don't check them.

Q Who does it, the Penn Central crews or Anheuser-Busch?

A Either the car inspector or the brewery checks

them. That is their responsibility. We are not supposed to check them, either I or the conductor.

MR. GAUS: I object to conclusions.

THE COURT: Sustained.

MR. GAUS: May I ask an appropriate instruction be given?

THE COURT: I will instruct the jury to disregard the statements of the witness as to whose responsibility certain tasks are.

Q Is it your duty to inspect the doors of those cars prior to pushing them into the plant or pulling them from the plant?

A No, sir.

Q Did you see the handles of this car prior to your accident?

A Well, I seen the whole five cars, but I didn't see each individual car.

Q You told us that you were out of work about six and a half months or so?

A Something like that.

Q You returned to work in May of 1969, is that correct?

A That is correct.

Q When you returned to work for the Railroad,

did you have to check into the Medical Department and get their okay?

A I beg your pardon?

Q When you returned to work did you have to go to the Medical Department of the Railroad to get their okay?

A That is correct.

Q And you also got the approval of your own doctor to return to work after this first period of absence?

A I had to get it from my own doctor to give it to the Railroad doctor.

Q You said that you lost intermittent time thereafter, is that right?

A That is correct.

Q On each occasion when you were out for any intermittent period, would you also go to the Medical Department before you were approved to return to work?

A No. You have to be out a certain length of time. I don't know what it is exactly.

Q More than three days?

A Yes, it is more than three days. I think it is up to five days, something like that.

Q If you are out for more than five consecutive

days --

A Then you have to get a doctor's note to go back to work.

THE COURT: And you were never out for more than five days after that?

THE WITNESS: Once or twice, yes, sir.

Q When you returned to work after this accident, did you work as a brakeman?

A Yes, sir.

Q Did you also work as a car marker?

A Yes, sir.

Q You told us that your job as a car marker was to mark cars with chalk?

A That is correct.

Q Was that in the classification yard?

A Well, they have classification yard and they have the departure yard, and they have a hump yard.

Q In your job as a car marker would you be working from a list, a paper?

A Right.

Q And you would have to mark individual box cars in that yard?

A Where they go.

Q Where they are to be switched by another crew?

A That is correct.

Q Did you bid in on that job?

A Yes, sir.

Q You say that the last time you worked for the Railroad was some time in 1972?

A Approximately. I don't know the exact date.

Q Have you attempted to return to work for the Railroad since that date?

A I went to my doctor and --

Q Just yes or no. Have you attempted to return to work for the Railroad since 1972?

A Yes.

Q When did you attempt to return to work for the Railroad after you last worked for them in 1972?

A Right after 1972.

Q You say that in 1972, some time in the early part of 1972, you did not work for the Railroad and have not worked for the Railroad since then?

A Since then, that is correct.

Q During that period have you attempted to return to work to the Railroad?

A No, sir.

Q Have you attempted to return to work as a car marker for the Railroad?

A I can't go back in any capacity.

Q I just ask you if you attempted to return to work as a car marker for the Railroad.

A Yes, sir.

Q Since that time, since March or early part of 1972?

A I would go back to work tomorrow if the doctor would allow me.

Q Back to work as a car marker?

A Yes, sir.

THE COURT: Which doctor are you talking about now, your own doctor or the Railroad doctor?

THE WITNESS: Well, the Railroad doctor has no say, see. In other words, he is not responsible. He must get the written consent of my doctor before he can give me a note.

THE COURT: All right.

Q Let me see. You have seniority since 1951, is that right?

A Yes, sir.

Q Have you attempted to obtain a job by exercising your seniority rights in passenger service on the Jersey Division?

A No, sir.

Q The only doctor who has been treating you is this Dr. Purray Burton? For this accident?

A As to the accident?

Q Right.

A And I seen some other doctor once, Dr. Ship, I think his name was.

Q That was for examination, is that right?

A Yes, sir. For examination, yes, sir.

Q But the only doctor who has treated you since this accident is Dr. Murray Burton?

A That is correct.

Q You told us about your having had your chauffeur's license expire. When did it expire? What year?

A It expired in 1970.

Q In 1970?

A Yes, sir.

Q What month in 1970?

A In August.

Q That was a chauffeur's license you had?

A Yes, sir.

Q Was that a New York State license?

A Yes, sir, New York State.

Q And you applied to the New York State Department

of Motor Vehicles?

A Yes, sir.

Q You spoke of having had a subsequent accident on a bus?

A Yes, sir.

Q Will you tell me about that accident. What happened to you?

A I got through working as a car marker, it was a Saturday night, about one o'clock in the morning, I got on a bus, a public service bus. We pulled into the Port Authority building in New York, and I don't know if the brakes failed, I couldn't determine that, all I know is the bus crashed.

Q Crashed into another bus, is that right?

A Crashed into another bus, yes, a bus standing ahead of us. And I fell down and my teeth came out and broke, and I cut my lip, the gum, and I had a sprained wrist.

Q How fast was this bus that you were in, how fast was it going at the time of the impact?

A Well, it wasn't going too fast. He was ready to park. We were up on the upper level.

In other words, he was about ready to park and let the passengers off.

Q You were seated?

A Yes, sir.

Q And were you thrown forward?

A Yes, sir.

Q And your mouth was thrown forward into the handrail of the seat ahead of you, is that right?

A Something like that.

Q And were you thrown backward again in the seat?

A No, sir, I just fell on the floor and my teeth busted.

Q In other words, you were thrown forward, your teeth went against the railing of the seat in front of you?

A Yes.

Q And then you fell to the floor?

A Right.

Q You don't know the speed of the bus, though, at the time of this accident?

A No. I know he was ready -- he had about another, I would say about a hundred yards to go before he comes to a stop and lets the passenger off.

Q Is it a fact he knocked the other bus, the standing bus, about fifteen feet?

A He wrecked the both buses.

Q Besides the injury to your teeth, you also injured your arm, did you not?

A My wrist. I had a sprained wrist.

Q How about your arm?

A Not my arm.

Q You brought a lawsuit against them, didn't you?

A Yes, sir.

Q And that was over in the Eastern District, in Brooklyn?

A Yes, sir.

Q In that lawsuit, didn't you claim that you sustained permanent injuries to your arm and to your wrist, your right arm and right wrist?

A Nothing about the arm. Just the wrist.

Q You retained Mr. Juron to represent you in that lawsuit, is that right?

A That is correct.

Q In that lawsuit did you claim that the injuries to your right wrist, your hand, and your forearm, were permanent injuries?

A No, sir.

Q You did not?

A No, sir.

Q In that lawsuit did you claim that as a result

of the injuries sustained in the bus accident that you were unable to grasp onto or hold onto the ladder hand holder or grasp on the side of freight equipment because of the weakness in your right arm and your right wrist, and that you must only pick car marking jobs?

A No, my right wrist was sprained, I couldn't hols anything.

Q I say did you make that claim in that lawsuit?

A That my right wrist was sprained, yes, sir.

Q Did you claim as a result of the injuries sustained in the bus accident you were unable to grasp or hold onto the ladder hand holder or grasp on the side of freight equipment because of the weakness in your right arm and your right wrist, and that you must only pick car marking jobs?

A In my right wrist, that is right.

Q And the arm?

A No, just the wrist.

Q Did you claim you were unable to work as a freight conductor or brakeman due to the condition of your right arm and wrist?

A My right wrist.

Q Did you claim in that lawsuit that you were not able to continue to do the work of a conductor or

brakeman in freight service, but you had to pick car marking jobs instead?

A Until my hand got better.

MR. HERBERT: I would like this marked for identification.

(Defendant Penn Central Exhibit A was marked for identification.)

Q I show you Exhibit A marked for identification, Mr. Batchkowsky, and call to your attention the second to last page thereof, and ask you whether or not that is your signature which appears in the verification?

A Yes, sir.

Q Are those the answers that you made to written interrogatories in that lawsuit?

A I don't know. I would have to read it.

MR. HERBERT: Counsel, will you stipulate those are the answers made by him in this lawsuit?

MR. JURON: We will stipulate, your Honor.

MR. HERBERT: I would like to offer in evidence the certified --

MR. JURON: May I check the pages, please.

MR. HERBERT: Yes. The certified interrogatories and the answers made thereto. Not in their entirety, but particular portions with which we are dealing here.

MR. JURON: Your Honor, plaintiff has no objection to allowing every page into the record.

THE COURT: I take it you are offering every page?

MR. HERBERT: Not every page. Just the printed portions, I would submit there would be portions not relevant.

THE COURT: You make your offer, and if Mr. Juron wants to supplement it by --

MR. JURON: We will allow the whole thing in.

THE COURT: He doesn't want the whole thing in because some of it is not relevant.

MR. HERBERT: That is what I am trying to avoid.

THE COURT: If you want to offer any part yourself --

MR. JURON: Either I think none of it is relevant or all of it is relevant. I would object to anything going in, but since Mr. Herbert sees fit to putting part of it in, I have no objection, as a matter of fact, to letting it all in.

THE COURT: If he is offering one interrogatory and one answer, that is permissible, providing he is offering the complete answer. If there are additional interrogatories referring to the same subject you want

to require him to offer, I will require it if in fact they relate to the same subject.

MR. HERBERT: We can take that up later on, your Honor.

THE COURT: What is it you are precisely offering, Mr. Herbert?

MR. HERBERT: The answers to 1 and 2. I will be right with your Honor.

73 and 74, and 111 and 112.

125 and 126 and 127.

131 and 132.

I think that would be the ones I would be offering, your Honor. We can review them perhaps at a more convenient time.

THE COURT: Those numbered interrogatories and the answers thereto will be received into evidence. Mr. Juron, at the break you can look at the remaining interrogatories and if you can satisfy me any of the others relate to the specific subject in the sense that these answers will be incomplete or misleading without the other answers --

MR. JURON: We will offer into evidence the entire paper, every one of the remaining 130 some odd questions and answers.

THE COURT: You cannot use the plaintiff's answers to interrogatories except as they are necessary to make complete or understandable the answers that the defendant is offering. They are not admissible by you or at your instance except as I have indicated.

(Defendant Penn Central Exhibit A received in evidence.)

Q Was your rate of pay as a car marker the same or greater or lesser than the rate of pay as a freight brakeman?

A The same.

MR. HERBERT: Thank you. That is all I have, your Honor.

THE COURT: Mr. Gaus?

CROSS EXAMINATION

BY MR. GAUS:

Q Counsel was talking with you, Mr. Batchkowsky, about the lawsuit that you brought in the Federal Court in Brooklyn, or the Eastern District as it is called, based on that accident in the bus. Now, you gave testimony in that lawsuit, did you not?

A Yes, sir.

Q And you gave testimony like you did this

morning here under oath. You raised your right hand and you swore to tell the truth, is that correct?

A That is correct.

Q And you were asked certain questions and you gave certain answers in response at that time, is that correct?

A That is right.

Q Were you asked a certain question relating to work as a car marker -- and I am talking about in that lawsuit over in Brooklyn -- about having worked prior to the bus accident as a car marker, and did you give an answer that there is no such thing.

In fact, with your Honor's permission --

THE COURT: I think you should refer to the transcript.

MR. GAUS: I have a copy of the minutes, and I think it would be best if I read specifically.

THE COURT: I think so, too.

Q Were you asked this question and did you give this answer?

MR. JURON: Could we have the date?

MR. GAUS: I only have one, and if he wishes to join me here, I don't even have one to offer to the Court. Maybe I should come up there and do it.

THE COURT: Do you have a copy of the transcript?

MR. JURON: I don't, but perhaps Mr. Gaus initially will be helpful enough to give us the date.

THE COURT: He will allow you to look over his shoulder while he reads.

MR. JURON: For the record, I would like the date.

MR. GAUS: Does the date December 5, 1972, refresh counsel's recollection?

THE COURT: Never mind that. If that is the date you can give it to him.

MR. GAUS: That is the date I see here.

THE COURT: We will assume that is the date.

Q Was your trial before the Honorable Orrin G. Judd, if you recall?

MR. JURON. We will stipulate there was a trial, and the date, and the Judge.

Q Now, Mr. Batchkowsky, my question is, were you asked the following question and did you give the following answer:

"Q And how long had you been working as a car marker, primarily as a car marker, prior to August 1970?

"MR. JURON: Objection."

I won't go into his statements unless he so wishes.

MR. JURON: Go ahead.

" (continuing) There is no testimony he worked primarily as a car marker."

THE COURT: You don't have to read the objection. Just read the questions and answers.

"Q Did you work primarily as a car marker?

"A There is no such thing. I am a brakeman. But if they need a car marker the guy who is oldest gets it."

BY MR. GAUS:

Q Were you asked those questions and did you give that answer?

A Yes.

Q And going on were you asked the following questions and did you give the following answers?

"Q I am asking what jobs you did -- did you bid in prior to the accident.

"A Independent brakeman. In other words, they put me in where they want to, but if there is a mark open and I am old guy they give it to me. But if not I have to take any job."

Q Were you asked that question and did you give

that answer?

A That is correct.

Q And the following question and answer, were they asked and answered as I read them now?

"Q Do you bid in on the job of car marker?

"A There is no such job as a car marker. It is a discretion of the yard master."

A That is correct.

Q So that when you told us this morning relative to being a car marker according to your testimony here, am I fair to conclude that you were a brakeman as such, and had been a brakeman, during this entire period following your accident of 1968 and down to the time of your second accident?

A All jobs are brakeman jobs.

Q As a brakeman?

A Yes.

Q And you returned after the accident on the Railroad, you returned to your job as a brakeman, isn't that a fact?

A As a brakeman, yes.

Q Right. And that whatever you may have done relative to this business of marking cars was done with the consent of your -- what did you call him,

yard master?

A That is correct.

Q But you were still working as a brakeman, no question about that?

A That was my title, brakeman.

Q Right. And you worked as a brakeman after the accident that we are here concerned with?

A Marking cars, yes.

Q Whatever you did, you were a brakeman after this accident, isn't that a fact?

A That is correct.

Q And it would depend on the yard master whether or not you marked cars as a brakeman?

A That is right, yes.

Q All right.

Now, then, to go on to the accident of 1970, where you had the bus accident, you interrupted your employment after that accident for some period, did you not?

A That is correct.

Q So that you did not work as a brakeman, or in fact you didn't work as anything following that accident?

A Right.

Q You made certain claims in that lawsuit in Brooklyn which have already been offered, is that correct ?

A Right.

Q Now, having interrupted your work, and by reason of that accident on the bus you claimed that you couldn't do work for the Railroad as a brakeman or car marker, whichever term we wish to use, isn't that a fact?

A Right.

Q I believe this morning you told us one of the jobs of a brakeman is to ride the cars in, or ride the cars when they are going into an industrial plant or otherwise, you used to ride cars and hang on, is that correct?

A Right.

Q Would you describe that operation for us, how you would do that?

MR. JURON: Objection. You mean how he did that, or how he would do it now?

MR. GAUS: I mean how he did it before when he was healthy.

MR. JURON: You mean before November 8, 1968?

MR. GAUS: Any time before he claims he was injured.

A When you have a car you are shoving or pubbing,

you grab the first car, there is a ladder on the front, and you hang on with one hand, and with the other hand you pass signals; if it is a long train we have another brakeman stationed in the middle of the train, and he relays the signals, but if it is a short train then you just relay it to the engineer.

Now, the reason you stand on the front car, you watch the road ahead of you, there could be an obstruction, there could be a broken rail, there could be anything. That is the main purpose of riding that head car.

Q You say you hold on?

A Yes.

Q What specifically do you hold on to?

A It is the running of a ladder, an iron ladder that has got about seven or eight rungs on it, and you hang on whichever is convenient for you.

Q Are the rungs of that ladder on the side of the car, or on the front of the car, or just where are they located?

A There is one ladder on each side of the car, and there is one ladder in the front of the car, and one ladder in the back of the car.

Q When you are riding as a brakeman, and we are

talking about at the time before any accident, when you did it normally and you would ride as a brakeman, it would be logical to assume that you would ride on the side of the car, am I correct?

A That is correct.

Q And it would be necessary, of course, for you to hold on with one hand as you do the signaling with the other?

A That is correct.

Q And would it be fair to conclude that it would be necessary to hold on in some instances with your right hand, and in some instances with your left hand, depending upon the circumstances of where the engineer is located or the conductor is located, and so on? Is that a fair conclusion on my part?

A That is correct.

Q And in 1970 then you made this claim that you injured your wrist. Is that correct?

A That is correct.

Q Obviously, your wrist played a part in holding on to any rungs. As a brakeman your wrist would play a part, would it not?

A That is correct.

Q Did you ever go back to work as a brakeman in

which you road cars holding on with one hand or the other after your bus accident?

A No, sir.

Q Incidentally, may I ask you --

MR. GAUS: Before I do, it may be appropriate, your Honor, if we approach the side bar. I have a question that before I put it I would like to consult with the Court.

THE COURT: All right.

(At the side bar.)

MR. GAUS: I believe we have established sufficiently that he has had in 1970 an accident which interferes with the brakeman function, and so on. He is laying claim here to a permanent injury. I anticipate asking the question -- I would abide of course by your Honor's ruling, but I intend if I am not prohibited from same to ask him whether in the Federal Court in Brooklyn he recovered a judgment against the bus company on the claims that he made.

I will avoid asking the amount, but I think it is relevant and pertinent to our suit here that there apparently was a finding over there.

THE COURT: Not unless your claim is limited to a recovery on the basis of permanent disability.

Obviously, a recovery on the basis of pain and suffering in that case wouldn't be relevant here.

MR. JURON: May I point something out, your Honor.

THE COURT: Yes.

MR. JURON: His testimony on direct examination was that he did not resume the job of a brakeman riding a ladder before the bus accident, so whether he was unable to do so after the bus accident is not pertinent because he couldn't do it before the bus accident.

THE COURT: I think the portion of his testimony in the Brooklyn case that was read by Mr. Gaus is sufficient to go to the jury as to whether or not he was able to work as a brakeman before the 1970 injury.

MR. JURON: I fail to see what the results of that lawsuit can be germane to this.

THE COURT: I do. I thought I had explained that to you before. I will try again. You are claiming here permanent disability as a result of a 1968 injury. If he claimed and was awarded a recovery for permanent disability as a result of the 1970 injury, that is relevant to show that his present state of permanent disability, if he has one, is attributable at least in part to the 1970 injury, and not entirely or perhaps

not at all to this 1968 injury.

MR. JURON: I think in that case it is incumbent upon Mr. Gaus to come forward with a special verdict, since he is the one who is making such an assertion. It is incumbent upon him to show that the determination of the jury, whatever it was, was limited or specifically concerned with that aspect of the lawsuit.

THE COURT: I have already so ruled, and unless he can show the jury specifically found permanent disability in that Brooklyn case, it is not admissible. If he can show they did, it is.

MR. GAUS: I think I am going to be in a position of not pursuing the point. I only say this. As I said at the outset, I am not pursuing a question of amount. I think it might be highly relevant as to the amount awarded, whether it was on the question of whether or not there was a permanent damage.

THE COURT: No, that asks the jury to determine too much.

MR. GAUS: I will let it go.

THE COURT: Unless you can show there was a specific finding of permanent disability in the Brooklyn case, then I don't think it is admissible.

MR. GAUS: I will be so guided. Thank you.

(In open court. Jury present.)

BY MR. GAUS:

Q Mr. Batchkowsky, when Mr. Herbert asked you some questions a few moments ago I believe you told us that you had done switch work as a brakeman in other industries, and I think you even specified that on the same shift you had done such switching, and in those other instances you rode into the plant, I think you said. Is that correct?

A Yes, sir.

Q Can you give us some indication of where this had happened?

A It is what they call the west side of Waverly Yard. They have got different plants there, breweries, Anheuser-Busch, about 40 to 80 plants, I don't know.

Q Is it your contention that you rode into the plant and into loading platforms on the side of cars? Is that your contention?

A Unless there was a sign there we always rode them in.

Q Into the plant itself?

A Yes, sir.

Q There was a sign in this particular case, was there not?

A I beg your pardon?

Q The one we are talking about in this lawsuit.

A In Anheuser-Busch?

Q Yes?

A Yes, sir.

Q There was a sign there. The sign gave warning, did it not?

A Yes, sir.

Q And accordingly you didn't ride into the plant?

A Right.

Q You had been inside that plant I think you said on previous occasions, do you recall?

A Right. That is correct.

Q It wouldn't even be possible, would it, Mr. Batchkowsky, for you to be on the side of the car as it moved along the loading platform itself, isn't that a fact?

A That is correct.

Q Incidentally, with respect to the ladder, I don't think we completed the picture, did we, as to this ladder that is on the side of the cars. That ladder doesn't start with the floor of the box car, does it?

A No. It is the length of the car, and there

are rungs beneath the car.

Q Right. So that if you were hanging on the side of the car, the rungs that are beneath the floor of the box car would cause your feet to be down and part of your legs to be down below the level of the box car, isn't that correct?

A That is correct.

Q And, accordingly, your legs and your feet would be below the level of a platform which is flush with the floor of the car, isn't that a fact?

MR. JURON: Objection, your Honor. We have some confusion. Can you clarify it? Do you mean the way it existed improperly or the way it should have existed properly?

Is Mr. Gaus putting a question to the witness the way the situation was on November 8, 1968, or the way it should have been.

THE COURT: I think he is asking about the way it was in November of 1968.

MR. GAUS: I object to that question. Exactly, and I object to this categorizing what it should have been, if your Honor please.

THE COURT: Yes, I will instruct the jury to disregard counsel's statement as to what it should

have been.

Do you understand the question now, Mr. Batchkowsky? It is whether or not as the plant loading platform actually existed in November 1968, if a brakeman were standing on the lower part of a ladder on the side of a box car as it moved into the plant, his feet and/or legs would be struck by the edge of the platform?

A That is correct. Yes, sir.

THE COURT: All right.

Q And in fact I think there has been some mention the platform itself and the side of the cars were some possibly three, four inches from each other, isn't that a fact?

A Right.

Q Just to clarify things for the moment, the platform was ahead of you as you stood relaying the signals as you were inside the door, isn't that a fact?

A Right.

Q And I think you have marked a photograph -- it was Plaintiff's Exhibit 2, I believe -- where you were standing and that of course was between the door and the platform.

A Yes.

Q And that area has some couple of feet, I think you have stated, from the side of the box cars over. There is a couple of feet clearance, as you refer to it in railroad terms as I understand, is that correct?

A Just about a couple of feet.

Q In fact, there is more than that, is there not, because in that same area there is a stairway that goes up that one walks into and up to get to the platform, isn't that a fact?

A Yes, there is a stairway there.

Q The opening for the stairway is how wide, would you say?

A I don't know.

Q Can you give us an estimate?

A About two feet.

Q So that is an additional two feet on top of the two feet of clearance alongside the car, is that correct?

A No, no. Definitely not. From the side of the car to the wall is two feet, and the ladder goes into that platform, so it is less than two feet.

THE COURT: No, the two feet would be from the edge of the car to the edge of the stairway, wouldn't it, Mr. Batchkowsky?

THE WITNESS: To the edge of that second platform.

THE COURT: And if you go farther toward the door, before the stairway starts, then there is more than two feet between the side of the car and the wall. That is what he is asking. You can look at the photograph, if you want to refresh your recollection.

Q Mr. Batchkowsky, would you look at the Plaintiff's Exhibit 3, that your lawyer has introduced in evidence, and see if that refreshes your recollection as to whether or not in fact there is an additional space to the left side -- first of all, may I withdraw that and say there is no question you were on the left of the train as it moved into that B-9 platform?

A Yes.

Q Now, to the left of the train, before you get to the stairway, or at a position not alongside the stairway, but in any other place along there prior to the platform, you have got two feet of space, correct?

A You have got two feet of space.

Q Of clearance?

A From the track to the wall.

Q All right. And then there is an indentation in the wall that gives you a couple of more feet where

one can step into and go up the stairs to the platform, isn't that a fact? Now look at that photograph and see if that isn't so.

A Yes, you can walk up the stairs to get on the platform.

Q All right. So that in addition I would ask you to look, in addition to Exhibit 3, would you look at Exhibit 6 and see if that doesn't also bear out what we are talking about; and Exhibit 4.

A Yes. Go ahead.

Q So that in addition to the normal two feet clearance that we have talked about that is alongside the cars, there you have that additional space where the stairway goes up that you could also step into in that situation.

A But you cannot see the engineer no how, no way.

Q No?

A No, sir.

Q I didn't say that.

A Well, what good is the space if you can't pass signals?

Q If something were coming in protruding from a train, if there was a handle or something like that sticking out from the side of the train, you wouldn't

even be confined to the two feet that we have originally talked about, but you could duck into that stairway even to avoid it, couldn't you?

A Yes, sir.

Q And you had talked about passing the signals from the conductor back to the engineer. I believe you told us that you had looked back at the engineer in the process of giving the relay of the signals. Isn't that a fact?

A Right.

Q And you had done that before the train came into the B-9 siding, right?

A That is right.

Q In fact, you were a part of that crew for the entire time as that particular train was being made up, isn't that a fact?

A That is right.

Q And that train was made up of five cars, did you say, and an engine?

A About five cars, right.

Q So that having been a part of that crew in making up that train, as a brakeman you would have had some function in assembling those five cars and locomotive, is that not a fact?

A Yes, sir.

THE COURT: Are you going to have much more on cross, Mr. Gaus?

MR. GAUS: I believe I will, your Honor.

THE COURT: Let's take our afternoon break then of ten minutes.

(Recess.)

(In open court. Jury present.)

CONTINUED CROSS EXAMINATION

BY MR. GAUS:

Q Before the break we were talking about the make-up of the train involved, which we have already determined was a five car locomotive train that was in the process of moving into the plant at the time of your accident. Is that correct?

A Yes, sir.

Q All right. Those five cars were made up of some cars that came out of the yard, as I understand it, is that correct?

A Yes, sir.

Q Is that the Waverly Yard, generally, is that the way it is termed or referred to?

A Right.

Q Incidentally, let me just ask you a question that I don't think has been asked of you. Can you identify the particular car that was involved in this accident with you?

A No, sir.

Q I take it by that you couldn't -- can you describe the car?

A As far as I know, it was a reefer, a refrigerator car, it had two doors with two handles. I think it was a yellow color, I am not sure.

Q What you are saying is that without further identification there were two doors, is that correct?

A That is right.

Q When you say two doors, are you referring to the same side of the train or one door on each side?

A The same side of the train.

Q And two handles, is that right?

A That is correct.

Q Where are the handles located?

A On the door, in the middle of the door, on the edge.

Q And do the handles move with the door?

A To open or close the door you have got to move the handles.

Q And are they the type of door that when it is open, or the two doors, I should say, that when they open they move away from each other, and when they close they come together, is that the type of door we are talking about?

A They come out.

Q When you say they come out, what do you mean?

A It is like opening up a refrigerator door. It is not a sliding door.

THE COURT: You mean the doors swing out on a hinge?

THE WITNESS: That is right.

THE COURT: They don't slide on a track?

THE WITNESS: No, sir.

Q Mr. Batchkowsky, I want to make sure we understand. Is it your testimony that the door, one end of the door in each case, is hinged so that the door swings all the way out on a pivot, or does it pivot out a way and then slide back on a track?

A I wouldn't know if it goes all the way back or if it slides out a bit.

Q Let me ask you this. In answer to his Honor's question you did say, did you not, that the doors swing out?

A Yes, sir.

Q That is the point I wanted to address myself to for a moment. When you say they swing out, assume a door -- I don't know how wide they are, maybe you can tell us. How wide is each of the doors involved?

A I wouldn't know either.

Q Give us your best estimate, and please use anything in the room as an approximate width, if you can, just so that we can get some estimate as to the width of each of the doors.

A Somewhere between 6 foot, 7 foot, I don't know.

Q All right. Now, is it your testimony when that door is open, either one of them, and you say there are two of them in this case, when it is open it hangs 6 or 7 feet out away from the train, the further edge of the door? Is that what you are telling us?

A It opens up and then you fold it back against the side of the car.

Q But before it is folded back against the side of the car, assuming it is open half way, is that door, the door, the edge of that door, that is away from the pivot point, is that 6 or 7 feet out from the train itself?

A I wouldn't know the exact dimensions.

Q All right. In fact, is it possible that you

are confused about whether or not these doors slide back and forth?

A I am not confused. I just don't know anything about doors. I have nothing to do with doors.

Q All right.

But you do know they have handles on them?

A Yes, that I know.

Q And in this case there were two doors and there were two handles, is that correct?

A That is correct.

Q As you made up the train with the five cars, where did the car that was closest to the locomotive come from?

A The car closest to the locomotive?

Q Yes. That would be the first one that the locomotive attached to, would it not?

A Yes. It was either inside the building or outside. I don't remember. It is a long time ago.

Q So you don't remember?

A No.

Q How about the second car, where did that come from?

A I don't remember. I know we got some cars from the plant and some cars from outside the plant.

Q All right. And so far as you know, you cannot identify which of the cars came from outside the plant, nor can you identify which of the cars came from inside the plant, is that right?

A I would be guessing. I wouldn't know.

Q On the day of your accident, were you doing some marking or were you doing some brakeman work on those cars as the train was made up?

A I was doing brakeman's work.

Q And when you were outside the plant in the yard where the train is being made up, as I understand your custom, you would be riding on a car and that would be the lead car, is that right?

A That is correct.

Q When the engine is alone before it hitches up to any car what do you do, or what was your duty there, before the first car was coupled and attached?

A Well, you couple up to the car that you need, and whatever else you need you make them all up together and then you shove it in.

Q Did you do any of the coupling?

A My conductor, that is his job, he done the coupling, yes.

Q Maybe you didn't understand my question.

A The last move he didn't make the coupling.

Q My question was what did you do with relation to the first car up until the point it is attached or coupled with the locomotive?

A Well, we make a hitch, we pass the signals, and then whatever track we have to go on next, either me or the other brakeman throws the switch and we go on the next track.

Q When the locomotive is coupled with that first car, then that makes the first car the lead car, is that correct?

A That is correct.

Q You couple them up and then you make up the train by the individual cars as you make them up, right?

A Right.

Q Okay. Now, if you got the first car as the lead car that would be the one that you would be riding when you are outside, you would be hanging on the side. You say that is your function and you ride that first car, right?

A That is correct, right.

Q Okay. At some point you approach the side of that car undoubtedly in order to reach up and hang on to it, is that correct?

A Right.

Q Now, when you approached the side of that car, did you observe whether or not any handles were protruding or hanging out?

A No, sir.

Q Did you observe whether any handles were protruding or hanging out as you approached the side of the second car?

A No, sir.

Q Did you do so as you approached the side of the third car?

A Well, I give it a regular glance. You don't examine each car.

Q You don't?

A No, sir.

Q Let me just ask you: Did you observe the side of any of the cars of that five car train prior to your accident?

A As far as I can determine, there was nothing out of the way. No cars were open and no handles sticking out.

Q As far as you could determine?

A That is correct.

Q Did you make an attempt to determine this,

and if so tell us what you did.

A No, I did not make an attempt. It is not my job.

Q All right. So at any rate I take it that you didn't do anything to observe whether or not there were any handles hanging out or anything else hanging out or protruding from the cars as they were moving in, in the direction of that B-9 plant, is that what you are telling us?

A I done my job as a brakeman, period.

MR. GAUS: May I ask that that answer be stricken, and that the witness be directed to answer my specific question, if your Honor please.

THE COURT: Yes. Will you read the question again, please.

(Question read.)

A I give it a fast glance, and that is it. You can't examine every car. You might have a hundred cars, it would take you a year to examine them.

Q So that am I fair to conclude, Mr. Batchkowsky, that you would rely on someone else or on whether or not by chance there was nothing protruding from those cars, is that what you are telling me?

MR. JURON: I object to the question, your

Honor. I think it is bad in form, and I think it also calls for a conclusion.

MR. GAUS: I beg your pardon.

THE COURT: I think the question is really superfluous. He has already testified that he didn't check the cars other than to give them a quick glance.

MR. GAUS: Very well, your Honor. I will be guided by your Honor.

Q Mr. Batchkowsky, if I may review your testimony earlier for just a moment, as I understand it there was some kind of a road crossing where automobiles would customarily go by at a point before you get to the door going into the plant, is that correct?

A Yes, sir.

Q And you got off of the train at some point in the vicinity of the road and you walked ahead of the train into the plant, is that what you have told us?

A That is right.

Q And you continued to pass signals from the conductor back to the entineer as you walked in, is that right?

A Right.

Q And once you got inside the door of the plant you continued to do so?

A That is correct.

Q And you even looked back to make sure that the engineer was in sight because, as I believe you have said, if I am paraphrasing your testimony correct, it would do no good to signal the engineer if he were not in sight so you looked around to see if he were in sight, is that correct?

A That is correct.

Q W..en you looked around to see if he were in sight did you see some handles sticking out from any one of those cars?

A No, sir.

Q You didn't?

A No, sir. If I seen it I wouldn't stay and get hit, would I?

Q That is why I want to know whether or not you saw them or whether you really looked.

A Some times the train jolts the door open or the handle, I don't know.

Q Let me ask you this. Do you know if any of those five cars were loaded or unloaded or what the condition of each of those cars happened to be on that occasion?

A No, sir, I don't know anything about cars being

loaded or unloaded.

Q The loaded cars have their doors closed, would they not?

A They are supposed to.

Q Am I fair to conclude that the car involved in your accident would have been an open car unloaded since the doors or door handles were protruding and open?

A Not necessarily. It could have been closed.

Q What could have been closed?

A The doors. A lot of times when they empty the car they close the doors.

Q I am talking about whether or not the cars were empty or loaded at this point, firstly?

A I don't know.

Q You don't know?

A No.

Q At any rate we have established, have we not, and I want to be sure of this, that when the doors are closed they are touching each other, because they are alongside each other, are they not?

A Right.

Q And when they are touching each other that means the handles are closer to each other than when the doors are wide open, isn't that a fact?

A That is a fact.

Q All right. As I understand your testimony from this morning, you got hit by two handles, is that right?

A Yes, sir.

Q How much of an interval was there between each of the handles coming in contact with you?

A I don't know. Because when I got hit the door may have swung open and the handle may have come out further, I don't know.

Q All right, let's reconstruct it, if we can. At some point a handle came in contact with your back. That was the first one, right?

A Right.

Q After which, I believe you have testified, that you swung around and then you started to go down, is that right?

A Yes, sir.

Q And then another handle came in contact with your head, correct?

A That is correct.

Q So that some interval of time occurred between the first handle, as the train was moving by, and the second handle coming in contact with you, isn't that

a fact?

A That is correct.

Q Did you say anything to the people at the plant when your accident happened, or immediately after?

A No, sir.

Q You didn't tell them that you were involved in an accident and could you use their facilities, or could they get you some help, or anything like that?

A I didn't say anything, but I can tell you what happened.

Q One question at a time, if I may.

A All right. I didn't say anything.

Q I understand what happened was that your yard master took you to the Elizabeth Hospital. Is that correct?

A That is correct.

Q How far away was that from the scene of the accident?

A About a half mile or so.

Q At that point you saw some doctors, I take it, in the Elizabeth Hospital, where they examined you, is that correct?

A Yes, sir.

Q And you received some emergency treatment?

A That is correct.

Q What did that emergency treatment consist of?

A They gave me a couple of shots, injections, and then they put something on my head, and they gave me some kind of a sedative, and they sewed me up, stitched me up.

Q How many stitches were involved?

A I don't know.

Q After that were you admitted to the hospital?

A No, sir.

Q It was just emergency treatment and you left the hospital and came back and changed into your own clothes and went home, is that right?

A That is correct.

Q When was the next time you saw a doctor?

A Well, I seen a doctor before three or four days later.

Q The doctor you saw three or four days later was a Railroad doctor, wasn't it?

A That is correct.

Q You didn't call in your family doctor and say "Doctor, I have been involved in an accident"?

A No, sir.

Q You went up to the Railroad and a medical doctor

up there you saw or consulted with, and that is something you don't have the exact date, I take it.

A No.

Q At any rate, he doesn't treat you, does he, this Railroad doctor?

A In emergency he treats me.

Q Three or four days later was beyond the emergency. You had the emergency back in the Elizabeth Hospital. That is your emergency treatment, wasn't it?

A That is correct.

Q By the time you went up to the Railroad doctor -- where was that, by the way?

A Penn Station, 31st and Eighth Avenue.

Q All right, you went up there and something transpired, you talked to the Railroad doctor, and as I understand it he told you to come back some time, is that right?

A Right.

Q How much of a period intervened between the first visit to the Railroad doctor and the second visit?

A It was altogether about a week or ten days.

Q You also mentioned a Dr. Burton, whom you ultimately saw and under whose treatment you came. When was the first time you saw Dr. Burton?

A A little after a week after I got hurt.

Q I think you also had a family doctor, did you not?

A Well, it is not a family doctor, it is a local -- it is a local doctor, a general practitioner.

Q Didn't you describe him as your family doctor?

A Well, it is not exactly a family doctor, but in case somebody has a cold or something like that you go to him.

Q Wouldn't that be a family doctor to you, Mr. Batchkowsky?

A I guess in a way it would be.

Q Did you call in your family doctor the day of your accident?

A No, sir.

Q Did you call in your family doctor the day after your accident?

A No, sir.

Q Did you call in your family doctor three days after your accident?

A No, sir.

Q Did you receive any treatment from your family doctor at any time for the injuries you claim were involved in this accident?

A No, sir.

Q At some point a week or so later you went to see a Dr. Burton, is that right?

A Yes.

Q Dr. Burton was recommended to you, was he not?

A That is correct.

Q By whom?

A Well, he more or less was the union man, the chairman of the local, everybody got hurt used to go to him, so I went to him. Who else am I going to go to. I don't know nobody else.

Q In other words, as I understand it, Mr. Batchkowsky, you went down to the union hall --

A I did not go down to the union hall. Don't put words in my mouth.

Q I am sorry. Let's put it this way. You got in touch or you communicated in some way with the union hall, and they said go see Dr. Burton?

A That is correct.

Q Dr. Burton is the gentleman who gave you treatment of which I believe you told us there were some 40 visits or so?

A Something like that, yes.

Q Dr. Burton is recognized by the union as the

doctor --

A That I don't know, if he is recognized by them or not.

Q Well, what did Dr. Burton do for you on that first visit?

A He gave me a couple of shots, injections, he gave me some pain killers, he gave me some stuff to rub on my neck, and he told me to come back in a week. Then he took x-rays.

Q What areas did he x-ray?

A How should I know?

Q You weren't anesthetized when you were being x-rayed, were you?

A I beg your pardon?

Q Were you under an anesthetic at the time of your x-rays?

A No, sir.

Q Don't you know where he x-rayed you?

A Oh, I thought you asked me if I knew where the x-ray pictures were.

Yes, he x-rayed me on the head and the neck.

Q After taking the x-rays what specifically did he do for you by way of treatment?

A Well, he told me --

Q Apart from any pills or medication he may have given you?

A How many?

Q Apart from that what did he do?

A Oh.

Q In other words, if he gave you some pills or medication, don't tell us about that for the moment, I want to know what he did by way of treatment.

A He sent somebody down my house and they measured my neck and they put a collar around there. They fitted me out with a collar, in other words. And he told me to wear that until, you know, six months or a year.

Q Was that the complete course of treatment by Dr. Burton?

A What do you mean by recourse?

Q Was that the complete course of treatment? Was that everything he did for you by way of treatment for you?

A The first visit, yes.

Q Thereafter, would you tell us what he did for you?

A Well, he give me a shot in the shoulder, or the neck, and he would give me more different medications. He kept giving me different kinds of medications. When

I took them it helped me out a lot.

Q I asked you to hold off on the medications for a moment because probably we will be able to get that from the doctor, but what I want to know from you relative to the treatment is what specifically he did apart from the medication.

A I don't follow it. That is what he done.

Q You told us he arranged for a collar. Now, what else if anything?

A Well, that is what he done.

Q That was all?

A Yes. He didn't cut me or anything. He took x-rays.

Q Was Dr. Burton your doctor for the injuries you sustained in this later accident?

A No, sir.

Q Were you under treatment during the time of that second accident by Dr. Burton?

A Well, I was making my usual monthly visit to him, yes.

Q Did you tell him about the second accident?

A There was nothing to tell him about it. It didn't bother me. My hand was sprained and it got better.

Q I take it you went to some other doctor?

A I went to the dentist to get new dentures.

Q Did you in fact, Mr. Batchkowsky, have anyone treating you for the injuries to your hand or your arm?

A To my wrist, yes.

Q Did you?

A Yes, sir.

Q What is the name of that doctor?

A I don't remember.

Q I am sorry?

A I don't remember. It is in the records. You have got the records there.

Q I don't have the records.

A He must have them. I don't have them.

Q What was the name of your family doctor, Mr. Batchkowsky?

A Halpern.

Q Where is his office?

A East Brighton.

Q Do you know his first name?

A No, I don't.

Q Mr. Batchkowsky, did you return to work for the Railroad following this 1968 accident? I think you said you did.

A Yes, sir.

Q And when was that?

A About seven months after the accident.

Q And you returned at the same salary or income that you had?

A Well, we got a little raise. I don't remember the exact figures.

Q It wasn't less than what you had before?

A No. I told you we got a little raise.

Q At some time you stopped working for the Railroad. When was that?

A I stopped or I started?

Q You stopped and then we established you went back.

A I worked on and off.

Q When did you stop for good?

A About two years ago.

Q That would be after your second accident, is that correct?

A Approximately, yes.

Q Did you take any other jobs or did you have other income other than in any way connected with Railroad or anything of that sort? Did you have other income in the past two years?

A No, sir.

Q Were you doing any type of work at all?

A Nothing.

Q Either for yourself, in business for yourself, or for another?

A Nothing at all, sir.

Q How did you spend your time in the past two years?

A I had a couple of kids and some friends I used to go down every day to the Gil Hodges League, and watched my grandchildren. I have got a nephew of mine in the minor leagues, the little leaguers, I watch him play two or three times a week, and that is how I spend my time. I take walks.

MR. GAUS: I have nothing further.

REDIRECT EXAMINATION

BY MR. JURON:

Q Your classification was brakeman, is that right?

A That is correct.

Q Are there similar duties for a brakeman to perform?

A Yes, there is.

Q And depending upon the particular duties he performs as a brakeman he is given some additional title

or characterization, isn't that right?

A That is correct.

Q Can you name some of the particular duties that a brakeman has and the particular titles that he would have if he would do the particular duty of that brakeman?

A Well, they got one classification called car marker, you mark cars with a chalk, a crayon.

Q So a brakeman can be a car marker, correct?

A Yes. Then you have got another classification where the cars go up the hill and the man gets on to ride it, and it is going to go down the hill, so you have to pull what they call a cantilever so you can separate the cars, and the man rides it down the hill.

Q What is he called?

A A car rider. He is a brakeman, also.

Q What else do you have?

A Then you have got another guy when a train comes in, say, a hundred cars or so, and they cut off the engine and the brakes apply and there are aeronautical cars, so either one or two brakemen walk the length of the hundred cars and there is like a little nipple in the middle of each car, and they pull it and they bleed it, and that lets all the air out so they can push the cars again. Otherwise the cars won't move.

Q What is he called?

A A leader.

Q What else can a brakeman do?

Is there a car dropper?

A A car dropper.

Q What does he do if he is a brakeman?

A He rides cars.

Q He rides the car down a slope?

A That is correct. Then there is another classification when they drill cars they send them to different tracks and there is a man throws a switch to send that car on that particular track.

Q What is he called?

A A brakeman. He is a brakeman, but he does switchman's work for his own job.

Q What is he called?

Is he a switchman?

A He is a brakeman, but he throw switches for his crew.

Q Could a brakeman be a flag man, too?

A Yes, sir.

Q What does a flag man do?

A When a train is out on the road and they stop so he is in the back of the cars in what they call the

cabin car, the caboose. and he has to go outside with a red flag or a red lamp and watch out that another train don't come up on them, and they flag him down. That is why they call him a flag man.

Q So that in response to Mr. Gaus' question, when you returned to work you were still a brakeman, but your duties were limited to that of a car marker, is that correct?

A That is correct.

Q Now, Mr. Gaus asked you whether you ever returned to work as a brakeman riding cars after the accident of 1970.

A No, sir.

Q And between 1968, November 8, 1968 --

A No, sir.

Q Just a moment. Between 1968, November 8, 1968, and before your accident with the bus, did you return to work at any time to ride a car as a brakeman?

A No, sir.

Q Did you climb a ladder before the bus accident and after November 8, 1968?

A I was a brakeman, but I didn't do the regular brakeman's work, in other words.

Q Mr. Gaus spoke to you about clearances of two

feet, and stairways and ducking in. Do you recall those questions?

A Yes, sir.

Q When the train pulls into the platform, what is the distance from the edge of the platform to the side of the car?

A About four inches.

Q Four inches from the edge of the platform to the side of the car when the train is in?

A That is correct.

Q And this inset which is shown in Plaintiff's Exhibit 2 in evidence, where you were standing, from the wall to the edge of the platform is twenty-two and three-quarters inches, is that correct?

A I said approximately almost two feet.

Q So you have twenty-two and three quarters inches, plus four inches clearance from the edge of the platform to the side of the car, which is twenty-six and three-quarters inches, is that correct?

A That is correct.

Q Now, at the time that the train was moving into the siding, were you required to look straight ahead at the conductor and get signals from him?

A Yes, sir.

Q Were you required to keep your back, except for an occasional glance,to the engineer behind you?

A That is correct.

Q Could you during that time keep your body close up against the side of the platform during the time that you were watching the conductor and signal the engineer, close up against the platform within that space of twenty-six and three-quarters inchse? Could you do that, or did you have to stay some distance away from the back wall?

A I was in between like half way.

Q And why would you be standing half way, for what purpose?

A To see the engineer. I mean the engineer should see me.

Q Could the engineer see you if you kept your body flat up against the platform looking at the conductor?

A No, sir. There is a little turn there.

Q During the time that you were looking at the conductor and taking signals from him, did you at any time see the door handle that struck you before the time that it struck you?

A No, sir.

Q Did you at any time have sufficient time, as was suggested, to run back, turn around, and climb up the steps to get out of the way?

MR. GAUS: I rais an objection to the question, particularly to the words "as was suggested."

THE COURT: Sustained.

Q Did you hear Mr. Gaus suggest that there was room for you, additional room of some distance, to climb up the steps to get out of the way of a door handle sticking out?

A Yes, sir.

Q First of all, did you ever see that door handle before it struck you?

A No, sir.

Q And that train was moving at four miles an hour, is that correct?

A Approximately.

Q And about how far inside from the doorway were you standing at that time?

A About fifteen feet.

Q If there was clearance of eight feet instead of six feet one inch, would you have had sufficient room to ride into that siding holding onto the ladder as you always did in those instances except for in this

siding?

A Yes, sir.

Q You said it wasn't your job to check to see if the doors to cars were closed. Whose job was that?

A The car inspectors or the plant men.

Q Is that at any time the job of a brakeman?

A No, sir.

MR. JURON: Thank you.

REDIRECT EXAMINATION

BY MR. HERBERT:

Q Mr. Batchkowsky, you described this car as being a reefer car, a refrigerator car.

A Something like a refrigerator car.

Q Do those cars have what is known as plug doors?

A That is correct.

Q Those plug doors slide along tracks running parallel to the sides of the car?

A Some of them slide and some of them open.

Q Do you recall whether this type door was a type door that slid along the side or the type door that swings open?

A I don't know. I know some of them open up and you slide them and some of them you open up and push

them to the back of the car. I couldn't stop to examine it.

Q At any rate, you spoke of these cars, these five cars, these five cars that you were handling at the time of your accident; were these cars that you had picked up on various tracks at the Anheuser-Busch plant?

A That is correct.

MR. HERBERT: Thank you.

RECROSS BY

MR. GAUS:

Q You were asked whether or not the cars that you are talking about were picked up at the Anheuser-Busch plant. I think you said earlier that the train was made up of cars that came from the Waverly Yard. In fact, that was my specific question to you.

A No, that is the --

Q Some of the cars from the Waverly Yard?

A That is the Budweiser yard. It belongs to Waverly or Budweiser, I don't know who it belongs to, but those are the cars from the brewery.

Q There are a number of plants over in that area I think you told us at the outset this afternoon. In fact, you said that when drilling cars/some of the plants at you rode into plants on the side of the car, did you not?

A Yes, sir.

Q That is over in the vicinity of where we were talking about, is that not a fact?

A I beg your pardon?

Q That is in the vicinity of where we are talking about, where the accident occurred, isn't that correct?

A The accident occurred on the east side of the yard, and these sidings are on the west side of the yard, on the other side of the Railroad.

Q At any rate, they are in the general vicinity, are they not?

A Yes, approximately.

Q I ask you once again, can you identify the car that was in the accident with you as having come from any particular area? Do you know even which car it was? Do you know which car struck you?

A It came either from the plant or outside on the tracks of the plant.

Q Outside --

A How they lay after we gathered them together I don't remember.

Q And you don't know which it was that struck you, whether it came from inside or outside, or where specifically that car came from?

A That is correct.

Q And at the time of your accident Mr. Juron just asked you how far inside the plant you were and you said fifteen feet?

A Approximately fifteen feet. About half a car length.

Q Do you remember giving certain testimony on January 15th last, just a few days ago, where you raised your hand and swore to tell the truth and you were asked that very same question, I believe.

Were you asked the following question and did you give the following answer, and I am referring to pages 13 and 14. I don't know whether the transcripts are here. I have one.

MR. JURON: We will consider them executed.

MR. GAUS: Yes. There is a concession, your Honor, by counsel for the plaintiff that they are considered executed.

THE COURT: All right.

MR. GAUS: I don't know if we have a copy for the Court. I have one here.

MR. JURON: Give it to the Court and I will look over your shoulder.

THE COURT: Page 13?

MR. GAUS: Referring to pages 13 and 14, if your Honor please.

THE COURT: All right.

Q Line 22, were you asked the following question, Mr. Batchkowsky, and did you give the following answer?

"Q Will you describe please specifically where you were at the time of the accident?

"A I was just inside the plant."

Were you asked that question and did you give that answer?

A Yes, sir.

Q Was it true?

A Well, I was inside the plant, yes.

Q "Q When you say just inside the plant, can you give us some specific reference to where you were with relation to its entrance, and so forth?

"A I was about ten feet inside the building, inside the plant, and I was standing adjacent to track B-9."

Were you asked that question and did you give that answer?

A Yes, sir.

Q Which was true, were you ten foot inside or were you fifteen?

A I don't know. If I had a ruler, I would tell

you. Approximately ten-fifteen feet. It might have been twenty feet. I don't know. I was inside the building about a half a car length.

MR. GAUS: Nothing further.

MR. JURON: No further questions of this witness.

THE COURT: Thank you, Mr. Batchkowsky.

(Witness excused.)

MR. JURON: Shall we continue?

THE COURT: It is getting near our normal time of recess, and rather than call another witness we might as well take our evening recess now. We will come back at ten o'clock tomorrow morning, and I instruct you again don't discuss the case with anybody, including your fellow jurors.

(Time noted, 4:40 p.m. Adjourned to January 28, 1975, at 10:00 a.m.)

- - -

* * *

mdkm

MR. JURON: Your Honor, with the Court's permission I should like to introduce into evidence certain items of correspondence and documents obtained from the files of the Pennsylvania Railroad under subpoena.

I have shown the particular pieces of correspondence to my adversary, Mr. Herbert.

(Pause.)

Your Honor, may we have this marked in evidence, and at the appropriate time we will excise or remove the particular items of correspondence from the body.

THE COURT: Rather than marking that whole stack over an inch thick, I think it might be better to mark just the items in it that you are going to use.

MR. JURON: Yes, sir. That is what I intend to do. Shall I remove it now, or can we defer it until later?

THE COURT: You don't have to remove it now, but we can mark just those particular items in that stack you are going to use. You don't need to mark anything until you pick out the items you are going to use.

MR. JURON: May I read from these items which will be marked in evidence later on?

THE COURT: I take it there is no objection, other than what was previously noted in the robing room.

MR. HERBERT: That is correct, your Honor.

THE COURT: All right.

You may.

We ought to identify those that you read from.

MR. JURON: Yes, sir.

THE COURT: In other words, give them exhibit numbers.

MR. JURON: This will be Exhibit 7.

(Plaintiff's Exhibit 7 received in evidence.)

MR. JURON: Your Honor, at this time I would like to read only from certain of the correspondence.

This is a memo dated New York, New York, March 16, 1950. Subject: Newark, New Jersey proposed clearances for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard. It is addressed to initials ERS, and it is signed by KJS, and I have asked Mr. Herbert to stipulate that these are officials and personnel of the Railroad.

MR. HERBERT: ERS, your Honor, was the Division Engineer -- I am sorry, the Chief Engineer down in Philadelphia, and I think the author of that letter

was the Dividion Engineer for the New York Division.

MR. JURON: The text of the memo is, "Anheuser-Busch is making final designs for its plant, and has requested clearances as shown on attached prints of NYD 3115. Will you kindly advise if we may notify Anheuser-Busch that clearances shown are satisfactory."

A memo dated the following date, Philadelphia, March 17, 1950: Subject: Newark, New Jersey proposed clearances for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard. Addressed to KJS, apparently the signatory of the previous memo, and it is signed by ERS. The text is as follows: "Yours March 16, 1950. Inasmuch as there are apparently no extenuating circumstances which would prevent clearance with the side clearances required by standard plan 7005-A, we cannot approve 6 feet 1 inch clearance for the platforms. The overhead clearance of 22 feet on inside is satisfactory." And it is signed ERS.

Correspondence --

THE COURT: Let's give these exhibit numbers as we go along. Otherwise, we will be hopelessly confused. I understand the first exhibit you read was Exhibit 7, is that correct?

MR. JURON: Yes, sir.

THE COURT: Give him slips and let's staple those on. So we don't lose track.

MR. JURON: I have the memo of March 16, which is Exhibit 7. The memo of March 17th is Exhibit 8. I am now reading from 9, which is a memo dated March 21: New York, New York, March 21, 1950, Subject: ERS 3/17/50, Newark, New Jersey. Proposed clearance for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard. Addressed to ERS. Signed KJS. "Attached hereto is print of drawing R-1 revised March 6, 1950, showing in red the proposed bottling plant and in yellow the platforms that will be used for loading operations. You will notice that the bottling plant is camparatively narrow, and in order to have the number of tracks required to handle the output it is necdssary that the distance between platforms and tracks be kept to a minimum. This print is not final, and the lengths of platforms will change depending upon volume of output. However, it is anticipated that when the plant is in full operation platforms of about the length shown will be needed to handle the business. With the conditions that are to be met, will you kindly give further consideration to granting the request contained in our letter of March 16, 1950."

A memo dated Philadelphia, March 23, 1950, which is Exhibit 10: Subject, Newark, New Jersey, proposed clearance for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard. Addressed to KJS. "Yours March 21, 1950. You have given no valid reasons for permitting a clearance of 6 feet 1 inch for the platforms which apparently are to be used only for the purpose of trucking from the bottling plant to the cars. In such an event 8 foot 0 inches clearance would not be detrimental to their operations. Enactment of the clearance law by the State in the future might result in having to cut the platforms back at a considerable expense to Anheuser-Busch. Some states now require 8 foot 0 inches clearance for freight platforms. This is not an unreasonable requirement in view of the fact that we have had many personal injuries result from close clearance involving heavy claim payments." It is signed ERS.

Correspondence, New York, New York, March 28, 1950, marked Exhibit 11.

The subject is the same, if I may abbreviate. Addressed to ERS and the text is as follows: "The reason for req esting a clearance of 6 feet 1 inch is as stated in our letter of March 23, 1950, that sufficient

tracks can be built in front of the bottling plant to handle its output. The platforms are to be equipped with conveyors requiring a 22 foot width. Unless the 6 foot 1 inch clearance is permitted it will be necessary to eliminate one platform and track.

"Due to the location of the bottling plant with respect to the ladder track that will be built to the north, to which ladder the platform tracks will be connected, the length of the platforms is limited.

"Since the industry has signed our standard side track agreement, it appears the 6 foot 1 inch clearance could be used without involving the Railroad Company in damage suits. It would be appreciated if you would give further consideration to granting the request of the industry to vary from your standard clearances at the platforms. As of interest please note copy of letter December 6, 1949." Signed KJS.

Correspondence dated April 10, 1950, Exhibit 12. It is addressed to various initialed people. It is dated April 10, 1950.

"The question has recently arisen as to liability for injuries to employees or damage to property of the Railroad Company resulting from accidents when shifting cars over a private side track where structures

have been erected providing less than standard clearance. Our Legal Department, after a review of the present MW 14-C siding agreement, has concluded that it does not give the Railroad Company the necessary indemnity consideration for accidents of this sort. Therefore, in all future cases where the standard clearance for side tracks has been encroached upon, a separate agreement indemnifying the Railroad Company from liability for injuries to persons or damage to property that may occur on account of such encroachments should be consummated to place all responsibility on the industry involved. Enclosed herewith for your use is a specimen agreement that you are to prepare in all instances where any deviation from our standard clearance has been authorized.

"While paragraph 2 of this letter specifies 'future cases', we have in the recent past authorized clearances on private industry track that were not in strict conformity with our standard, and in all such cases you are instructed to secure an indemnifying agreement. In these instances the agreement to be prepared and executed is the specimen which was enclosed. The following is a list at least in part of some of the industries that have applied for and received permission to deviate from our adopted standard," and they mention --

MR. HERBERT: I will object to the words "at least in part," your Honor. That implies there may be others not indicated on that list, other industries.

THE COURT: Are you reading a direct quotation?

MR. JURON: Yes, sir.

MR. HERBERT: I misunderstood. I apologize.

MR. JURON: This is a direct quote.

This is a letter dated April 10, and it has been marked Exhibit 12, Mr. Herbert. A letter dated May 2, 1950, Exhibit 13.

MR. GAUS: May I enquire whether the last exhibit was fully read? I think he started to read something.

MR. JURON: I thought Mr. Herbert objected. Do you want me to read it to the bottom?

MR. HERBERT: I thought he was not reading verbatim. I apologize. Continue.

THE COURT: As I understand, Mr. Gaus wants you to read the entire exhibit.

MR. JURON: I thought Mr. Herbert was objecting.

I will go back to the last paragraph. "The following is a list at least in part of some of the industries that have applied for and received permission to deviate from our adopted standard: Sunbury, Pennsylvania, Central Builders Supply Company. Afloria, Penn-

sylvania, Backman Co. Philadephia, Pa., Philco Corporation. extension of bridge at 'C' and Ontario Streets. Philadelphia, Pennsylvania, Gross Brothers, Front and Benango Streets. Newark Waverly, Anheuser-Busch siding.

"Please see that the agreements are prepared and executed by the industry, then sent to this office with the usual number of copies for completion of execution by the Regional Vice President." And it is signed by some initials.

The letter dated May 2, 1960, Exhibit 14: addressed to Harlington, Ellington & Day, Inc., signed by the Superintendent, and I would ask a stipulation that Harlington, Ellington & Day, are the engineers for Anheuser-Busch.

MR. HERBERT: That is correct.

MR. JURON: "Gentlemen. In designing the plant of Anheuser-Busch, Inc. at Newark, New Jersey, it is our understanding you desire to use a distance of 6 feet 1 inch from the edge of a platform or dock to the center of the adjacent track. While this clearance provides space alongside cars for ordinary movements, it does not provide proper space for a man riding on the side of the cars. Our standard clearance, as you know, is 8 feet 0 inches. Instead of the 6 feet 1 inches you

desire. This 8 feet 0 distance being considered the proper clearance as mentioned in our standard siding contract agreement. Since the clearance you desire is less than our standard, we have prepared a supplemental agreement to the side track agreement of February 24, 1950, three copies of which are attached. Two copies should be executed by Anheuser-Busch, Inc. and returned to us for further handling. When the agreement is executed it will be considered that we have given permission to using the 6 feet 1 inch clearance. However, it should be understood that if a state law is passed setting the clearance at more than 6 feet 1 inch, Anheuser-Busch, Inc. may be placed to considerable expense to change the clearance to meet new requirements."

A memo dated Philadelphia, Pennsylvania, September 7, 1950, marked Exhibit 15. "This relates to your memorandum of July 5, 1950, enclosing letter from Anheuser-Busch, Inc. to Superintendent Triplett relative to proposed supplementay agreement on account of close clearance of side track at the Waverly plant of this industry. Copy of enclosed agreement is enclosed herewith with Mr. Triplett's letter, with the following comments. 1. There is no objection to combining the last two Whereas clauses into one clause to read as

mdkm

f-llows:

"'And whereas the industry has constructed or is about to construct platforms hereinafter called "structure" with the clearance as shown upon print of plan bearing number 4966 dated April 18, 1959, attached hereto, and made a part hereof as Exhibiti A,'

"It is agreeable to substitute the part 'adjoining' for 'adjacent to' in the third line of the Now, therefore clause, also substituting 6 feet 1 inches for 'close and hazardous' in the fourth line of this clause.

"Clause 2, substitute '6 feet 1 inch' for 'close' in the last line of this clause."

There are some additional material which I don't think is relevant, but if you wish you can read it later on.

MR. GAUS: That is Exhibit 15?

MR. JURON: Yes. I will show you where I stopped.

There is the supplemental agreement dated November 16, 1950. I should like to defer from reading that, but I would like to have it marked as Exhibit 16.

THE COURT: All right.

MR. JURON: I also would like to mark into

evidence correspondence from Anheuser-Bush dated September 16, 1952 marking that, if your Honor please, Exhibit 17, and defer reading that.

Lastly, correspondence dated September 19, 1952, marking that Exhibit 18, and defer reading that.

MR. GAUS: 18 is from whom?

MR. JURON: Letter from the Superintendent to -- I am sorry, that is September 9, 1952, from P. M. Roper, Superintendent, to R. T. Westrich, District Traffic Manager, Anheuser-Busch. That is 18.

Your Honor, I should like to read from certain answers by the defendant Penn Central given to plaintiff's interrogatories.

Mr. Herbert, if you would, please --

MR. HERBERT: Will you bear with me for a minute, please.

MR. JURON: May I respectfully request the Court to instruct the jury as to the significance of the answers to interrogatories, or was it done yesterday?

THE COURT: It was not.

Interrogatories are written questions that are submitted by one party in a lawsuit to another party, and they are answered under oath by an officer or employee of the interrogated party having information

about the matters enquired about.

The answers are binding upon the party giving the answers.

MR. JURON: I ask Mr. Herbert to stipulate that Joseph P. Pryle was the conductor, and James F. O'Kane was the engine man or engineer.

MR. HERBERT: That is correct.

MR. JURON: "1. State if the defendant -- and we are talking of the Penn Central Company -- have made an investigation of the accident to the plaintiff which occurred on November 8, 1968, at the Anheuser-Busch siding, Newark, New Jersey."

The answer by the Railroad is yes.

"2. If the answer to interrogatory 1 is in the affirmative, then state (a) the name and address of the person who conducted said investigation;

"(b) the relationship between such person or persons and the defendant.

"(c) the date or dates when said investigation or investigations were conducted.

"(d) the names and addresses of each person who has been interviewed, the date of each interview and the name and address of each person who conducted such interview or interviews.

"(e) If the results, substance or exact words used were recorded, transcribed or reduced to writing, give the name and address of the person or persons who have and have had possession of same.

"(f) the name and address of each and every person who gave a statement, the dates given and whether the statements were signed.

"(g) the name and address of each person who has or had possession of said statements.

"(h) Set forth in the answer to this interrogatory the substance of each statement, report, record or interview.

"(i) If you will do so without a motion, set forth a true copy of each document enumerated."

Answers:

"1. Yes.

"2. On March 25, 1969, J. S. Brannen obtained a written signed statement from James F. O'Kane of 3 William Street, Old Bridge, New Jersey, and from Joseph P. Pryle of 131 Church Street, Archbald, Pennsylvania; copies of their statements are in the possession of defendant's attorneys.

"The substance of Mr. Pryal's statement was that he did not witness plaintiff's accident, but

that there was close clearance between the side of the cars being moved and the plaintiff.

"The substance of Mr. O'Kane's statement was that as cars were being switched into the Anheuser-Busch siding and plant, plaintiff, who was inside the plant relaying signals, was struck in the head by the handles of a box car due to the close clearance between the side of the cars and the doorway and platforms of the plant."

If your Honor please, I am working out some stipulation with respect to the time loss and wage loss of the defendant between myself and Mr. Herbert. We will need a bit more time on that.

With that exception, and with the reservation for proof on the medical question, which we hope to bring forth tomorrow morning, plaintiff rests.

THE COURT: I take it, Mr. Herbert, it is agreeable to the defendant to have the plaintiff defer its medical proof?

MR. HERBERT: Yes, your Honor. I know it is difficult to get doctors in when you would like to.

THE COURT: Are you prepared to go ahead then with your first witness?

MR. HERBERT: If the Court would like, yes,

your Honor.

THE COURT: It is a little before our normal morning break, so go ahead, if you will, please, sir.

MR. HERBERT: All right. I would like to call to the stand, please, Mr. Pryle.

J O S E P H P. P R Y L E , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HERBERT:

Q By whom are you employed?

A Penn Central Transportation Company.

Q About how long have you been employed by Penn Central Transportation Company?

A Since the merger. That is from 1968.

Q Before that, by whom were you employed?

A Pennsylvania Railroad.

Q Were you employed by the Pennsylvania Railroad on November 8, 1968?

A Yes, sir.

Q Did you work on that day?

A Yes, sir.

Q Were you the conductor in charge of the crew in

which Mike Batchkowsky, the plaintiff in this lawsuit, was a member?

A Yes, sir.

Q Were you present at the time Mike Batchkowsky was injured at the Anheuser-Busch siding?

A Yes, sir.

Q When did you report for work on that day, Mr. Pryle?

A On November 7, 1968, at 10:30 p.m.

Q From that time up to your switching cars at Anheuser-Busch on November 8, did you perform switching operations?

A Yes, sir.

Q In various industries?

A Yes, sir.

Q How many industries did you switch out that evening before you arrived at Anheuser-Busch the following morning?

A Eleven, sir.

Q Eleven sidings?

A That is right.

Q Are these industrial sidings?

A Yes, sir.

Q What is the job that is involved in switching

cars at industrial sidings? What work has to be done?

A Pulling the loads out and switching them and putting empties in their place, or vice versa.

Q Besides Mr. Batchkowsky, who else did you have with you in your crew?

A I had a brakeman Dan Williams.

Q Who was your ingine man?

A Mr. O'Kane.

Q Your activities prior to that time were switching out eleven industrial sidings?

A Yes, sir.

Q Is there any standard custom or method which you use in removing cars or drilling cars into and from industrial sidings?

A Ride the side of the car into the platform and then spot the cars.

Q When you say ride the sides of the cars, for what purpose does a crew ride the sides of the cars when they are drilling industrial plants?

A For the purpose of spotting the cars.

Q Are crews required to pass signals from one to the other in these switch moves?

A Yes, sir.

Q When you arrived at Anheuser-Busch siding, do

you recall what time you arrived?

A About 9:15 a.m.

Q Mr. Batchkowsky told us he was in about a quarter of ten that morning at Anheuser-Busch, is that right?

A Yes, sir.

Q At the time Mr. Batchkowsky was injured, where were you?

A I was on the platform of B-9.

Q Of Track B-9?

A That is right.

Q When you came into Anheuser-Busch did you come in with a light engine?

A Came in with a light engine on B-8, sir.

Q And when I say light engine, what does that mean to you, sir, if anything?

A No cars.

Q And were you required in the course of your switching operations at Anheuser-Busch to move cars from one track to the other at that plant?

A Yes, sir.

Q At the time that the move was being made into B-9, do you recall how many cars were being moved?

A I believe a four-car draft, sir.

Q A four-car draft?

A Yes, sir.

Q Where were you when the cars were being moved in on B-9?

A I was on the platform of B-9.

Q Were you inside the plant?

A That is right.

Q What was your purpose of being inside the plant?

A I was concerned about that everything was secure in the plant, and there was a car on the platform on the bumper and it was being worked at that time.

Q In other words, prior to your moving these cars in on B-9 track, you determined that there was one car that was being worked inside the plant?

A That is right.

Q And when you say near the bumper what does that mean?

A Near the block.

Q Is that at the far end of the track?

A Right.

Q How many cars will that track accommodate inside the plant?

A It is good for eight 40's or six 50's.

Q Eight 40's, eight 40 footers?

A Yes.

Q Or six 50 footers?

A That is right.

Q Before the cars were moved in, did you advise the men who were working in the plant inside that car that the move was to be made?

A Yes, sir.

Q Is that what you are required to do?

A Yes, sir.

Q Did you give a signal to Mr. Batchkowsky to bring the cars into the plant?

A I gave him a high ball signal, sir.

Q And what did that mean?

A That meant that everything was clear, to come ahead.

Q In this plant do the crew men ride the cars, ride the sides of the cars into the various plants and tracks?

A Will you please repeat that?

Q Yes. I say when you are working at the Anheuser-Busch siding in Waverly, New Jersey, is it the practice of the crew men to ride the side ladders of the cars when they are switching cars into the various plants?

A No, sir.

MR. GAUS: I object to the question, unless we deal with the time in question here. What may be a general practice I would object to, if your Honor please.

THE COURT: He is talking about the Anheuser-Busch plant regardless of whether that conforms with the practice in other plants. He is asking whether or not it was customary to ride the cars.

MR. GAUS: No time limitation is placed in his question.

THE COURT: Has it ever changed?

MR. GAUS: I submit it has.

THE COURT: Then ask as if 1968 then.

Q As of 1968, was it the practice of the crews to ride the cars in on the tracks, at B-9 track?

A It was not my practice, sir.

Q Did you see an accident occur to Mike Batchkowsky?

A No, sir.

Q At the time the accident occurred you were inside the plant?

A Yes, sir.

Q At the far end of the plant?

A I was near it -- I would say about two car lengths from the main door.

Q Were you with anyone?

A I was with the foreman.

Q When you say the foreman, what do you mean by that?

A The foreman of the plant.

Q TheAnheuser-Busch foreman on that plant?

A The Anheuser-Busch foreman, yes.

Q Were you made aware of the fact that Mr. Batchkowsky was injured?

A I heard this foreman scream and holler, and I run down, I turned around, and I seen Mr. Batchkowsky on the floor of the plant.

Q Did you observe the car that was involved in Mr. Batchkowsky's accident? After the accident did you observe the car?

A Yes, sir.

Q What type of car was it?

A It was a 33,000 series reefer.

Q When you say reefer, is that a refrigerator car?

A A refrigerator car, yes, sir.

Q Is it a box car?

A A refrigerator car.

Q It is a box car, though, is that right?

A A box car, yes.

Q Can you tell me how the doors on that car operate?

A It is a plug door, sir.

Q What is a plug door?

A It opens up to about four inches, five inches, and she swings -- she operates on a sliding effect, a sliding door.

Q These doors are sliding doors?

A That is right, on a track on the car. One track on top and one track on the bottom.

Q Was this one door or more than one door on that side?

A One door, sir.

Q How many handles were there on the door?

A Two handles.

Q Can you describe for me how you close a plug door?

A Well, both handles have to be in place, and you have to twist the handle to lock the particular car.

Q When the door is fully open, in order to close it it is necessary to slide it closed?

A That is right.

Q And when you slide it closed then what is the next step that must be done?

A Both arms must come forward, and they must fit in a recess in the locking mechanism. Then there is a handle you turn to lock the door.

Q In the open position do the handles stick out at all from the sides of these cars?

A Yes, sir.

Q When a plug door is closed completely, is the door flush with the side of the car?

A Yes, sir.

Q When a plug door is opened, when you release the handles, does the door spring out four inches?

A Yes, sir.

Q And then it slides along the track?

A That is right.

THE COURT: Can the door be closed flush against the side of the car and still have the handle sticking out?

THE WITNESS: Yes, sir.

THE COURT: How far do the handles stick out from the side of the door when they are in the open position?

THE WITNESS: I don't know what you mean, sir.

THE COURT: Well, you say the handles stick

out from the side of the door?

THE WITNESS: Yes, sir.

THE COURT: Or it can in certain positions. When they are in the position where they stick out, how far from the side of the door do they stick out?

THE WITNESS: I don't know, sir.

THE COURT: Is it six inches or a foot or can you give us an approximation?

THE WITNESS: This type of door could be closed, and not locked.

THE COURT: I know. How far out from the side of the door do the handles stick when they are in their maximum protruding position?

THE WITNESS: I don't know, sir.

THE COURT: You don't know whether it is six inches or a foot or more?

THE WITNESS: No, sir.

THE COURT: All right.

Q After the accident to Mr. Batchkowsky, did you assist in removing him back to Waverly Yard?

A Yes, sir.

Q From there he was taken by the yard master to the hospital?

A Yes, sir. I believe the train master took him

Q Have you worked as a brakeman as well as a conductor?

A Yes, sir.

Q Would that be true prior to November of 1968?

A Yes, sir.

Q When you have worked as a brakeman switching industrial plants, have you ever yourself ridden the side of the cars into industrial plants?

A Yes, sir.

Q What is the distance between you and the platform inside the plant as you ride in?

MR. GAUS: I will object to this, unless there is some indication of what the question encompasses.

THE COURT: Read the question again, please.

(Record read.)

THE COURT: I am going to sustain the objection, because the plants are not sufficiently identified.

MR. HERBERT: The plants are?

THE COURT: The plants are not sufficiently identified. In other words, it hasn't been established up to now that he is talking about a particular plant or a typical plant or what.

Q You spoke, Mr. Pryle, before of having worked in ten or eleven plants on the night in question before

you arrived at Anheuser-Busch.

A Yes, sir.

Q What are the plants, if you can recall, that you worked that night?

A The names, sir?

Q The names of the industrial plants.

THE COURT: Are they all plants adjacent to the Waverly Yard?

THE WITNESS: Yes, sir.

A Sears Roebuck was one, Sears Roebuck warehouse. New York Penick Company. United States Steel warehouse. Steel and Alloy Tank Company. New Jersey Galvanizing Company. Louis Usdin, Junkamn. . Burry Biscuit. Schweitzer. Orbis Products. Tunnel Four. Vernon Paper Company. Outside One and Ourside Two.

Q When you switched cars in those industrial plants on the night in question, did you or your crew ride the cars into the plant as you were switching the cars?

A We rode the cars in on the platform, sir. These would be outside docks on some of these plants.

Q There were platforms adjacent to the trackage where you place these cars?

A Right, sir.

THE COURT: And in every case there was sufficient clearance so that a brakeman could ride the car in, and there was clearance for him between the side of the car and the edge of the platform?

THE WITNESS: In not all of these sidings, sir.

THE COURT: Which ones had the clearance and which ones did not?

THE WITNESS: Sears Roebuck had the clearances, and New Jersey, or New York Penick had clearance, and the United States Steel warehouse, they had plenty of clearance, New Jersey Galvanized had clearance. Steel and Alloy Tank Company also had clearance.

THE COURT: Which ones did not?

THE WITNESS: Tunnel Four, sir.

Q When moves are made into industrial plants, no matter how they are made, is it necessary for the crew to exchange signals from one to the other?

A Yes, sir.

Q While you were moving into this plant, the B-9 sid track of Anheuser-Busch, was it your intention to take care of the coupling of these cars against the car which was on the track, or at least to stop the car, the movement, prior to being coupled onto that standing car?

A That is right. I didn't want to couple to that car, sir.

Q You were just placing these cars in the siding?

A Yes, sir.

Q Would you be required to pass a stop signal on to your brakeman?

A Yes, sir.

Q And he would be required to pass it on to the engineer?

A That is right.

MR. HERBERT: Thank you.

THE COURT: Let's take our morning break now for ten minutes.

(Recess.)

(After recess.)

CROSS EXAMINATION

BY MR. JURON:

Q Mr. Pryle, you have testified that on November 8, 1968, when this accident occurred you were the conductor on this crew, is that correct?

A That is right.

Q For how long before November 8, 1968, had you been a conductor for any railroad?

A I was promoted as a conductor in November 1961.

Q And at that time you were employed by the Pennsylvania Railroad Company?

A That is right.

Q So that at the time of the accident you had been a conductor for approximately 17 years?

A No, not that long. 1961 I said.

Q Seven years?

A Yes, sir.

Q Would it be a correct statement to say that the conductor is the boss of the crew?

A Yes, sir.

Q Would it be a correct statement to say, sir, that when the train was moving as it was at the time that this accident occurred, it was your job as conductor

to be watching the train?

A Yes, sir.

Q And to be watching the area around the train?

A Yes, sir.

Q Were you watching the train?

A Yes, sir.

Q Were you watching the train when the accident occurred?

A No, sir.

Q Was your attention diverted momentarily?

A Yes, sir.

Q We have agreed that at this track B-9 Mr. Batchkowsky could not ride the side ladder into the building as was the usual procedure. is that correct?

A That is right.

Q As a matter of fact we understand, and we have seen photographs which provide that he should not ride the side ladder. Is that correct?

A Right, sir.

Q And at the time the accident occurred and before that time you were aware of that sign, of course, were you not?

A Yes, sir.

Q At the time Mr. Batchkowsky was standing inside

of the building at the time the accident occurred, was that a proper place for him to be standing?

A Yes, sir.

Q Was that place where he was standing necessary for him to receive the signals from you on the platform and relay them to the engine man, or the engineer who was shoving the train inside?

A Yes, sir.

Q Do you have a recollection of what that area looked like?

A Yes, sir.

Q Have you been there recently?

A No, sir.

Q May I show you, please, Exhibit 5 in evidence to help you refresh your recollection.

Does it help?

A Yes, sir.

Q Was it necessary for Mr. Batchkowsky to stand away from the wall of the platform in order to see the engine man?

MR. GAUS: I am going to object, if your Honor please. I think this calls for a conclusion. We are actually in this question asking the witness to draw a conclusion that I submit is for the jury.

MR. JURON: I will withdraw the question.

Q Can you give us your best approximation, using the photograph, if necessary to refresh your recollection, as to how far out from the entrance way to the building the curve in the track was?

A I would say about three car lengths.

Q You have testified that this train consisted of approximately four freight cars plus the engine?

A That is right.

Q At the time of the accident was Mr. Batchkowsky standing a short distance away from the platform?

A I don't know, sir.

Q Did you at any time see the door handles sticking out from one of the cars before the accident occurred?

A Yes, sir.

Q Did you make any signal to Mr. Batchkowsky warning him of the door handles sticking out?

A No, sir.

Q You are, of course, familiar with the rules for conducting transportation that were in effect on April 28, 1968, and particularly 400 M-1?

A Duties and responsibilities, sir, yes, sir.

Q If I may read it, 400 M-1 was in effect on

November 8, 1968, was it not?

A Yes, sir.

Q Having been enacted effective some six or seven months before that, is that correct?

A That is right.

Q And it provides conductors, and you were a conductor, conductors have general charge of the train to which assigned and all persons employed thereon are subject to their instructions. They are responsible for the prompt movement, safety and care of their respective trains, and the passengers and commodities carried, for the vigilance and conduct of the men employed thereon, and for the prompt reporting to the superintendent of conditions that interfere with the prompt and safe movement of trains.

That is correct, is it not?

A Yes, sir.

Q Now, as part of these rules there is a Rule 4158-H, is there not? Are you familiar with that rule, or were you familiar, or if I read it to you would it refresh your recollection?

A No, sir.

Q Let me read it, if I may.

Doors and drop bottoms, and I am quoting.

"Doors and drop bottoms of freight cars must be closed and fastened and top covers of cars must be secured in place as required."

Are you familiar with that rule?

Q Was it the responsibility of conductors operating in Waverly to see to it that freight trains operating over the road should have the freight car doors closed? Was that the responsibility of the conductor?

MR. HERBERT: Operating over the road or in freight yards?

MR. JURON: Operating in freight yards.

A In freight yards, sir?

Q Yes, sir.

A Will you please rephrase the question?

Q Was it the responsibility of the conductor to see to it that freight trains operating in the yards should have the car doors closed?

A No, sir.

Q It was not the responsibility of the conductor?

A No, sir.

Q May I show you this paper and ask you if this refreshes your recollection as to the responsibility of the conductor.

A That says over the road.

MR. HERBERT: May we have that marked for identification so I know what he is talking about?

(Plaintiff's Exhibit 21 marked for identification.)

Q Now, over the road does not mean a freight yard?

A No, sir.

Q Whose responsibility is it to see to it that the freight car doors are closed in the freight yards?

MR. GAUS: May I raise objection to the asking of this witness as to responsibilities in freight yards. I think that is what we are here to establish. Again based on the same objection I made previously, I think it is either a matter for the Court or the jury to decide. Again, counsel is asking a witness to place responsibility in this lawsuit.

MR. JURON: May I be heard on that, your Honor?

THE COURT: You may.

MR. JURON: This man is a conductor, at the time he was a conductor for seven years. He is an expert with respect to the movement of freight cars.

THE COURT: He is an expert with respect to the responsibility of conductors. Whether he is an expert with respect to responsibilities for the closure of doors in yard operations remains to be seen. He

hasn't been qualified as an expert on that.

Q As a freight conductor in 1968, and for some seven years before that, as part of your duties you were concerned with the making up and movement of freight trains, is that correct, sir?

A Yes, sir.

Q And you would pick up the cars to make up these freight trains at various points, is that correct?

A Yes, sir.

Q Was it your responsibility picking up freight cars at various industrial sidings and moving these cars to see to it that the doors to the respective cars were closed?

A No, sir.

Q Do you know whose responsibility that was?

A Yes, sir.

MR. GAUS: Again I raise objection.

THE COURT: First find out how he knows.

Q How do you know whose responsibility it was?

A To move freight cars where is that, sir?

Q In freight yards or industrial sidings.

THE COURT: How would you know whose responsibility that is?

THE WITNESS: I don't know, sir.

THE COURT: You don't know whose responsibility it is?

THE WITNESS: No.

Q If you as conductor saw a door handle opening or door handle open on a freight car as part of a train that you were directing the movement of, what was your responsibility as a conductor?

MR. HERBERT: We are speaking of switching plant operations, the main line, or what?

Q I am saying to you, assuming that you are directing the movement of a train and you saw --

THE COURT: I still don't know whether you are talking about over the road or in a yard.

MR. JURON: We are only concerned with in a freight yard.

Q Assuming you saw the door handle to a car in the freight yard and the door handle was open, and you were directing the movement of the train into a building of an industry, what was your responsibility as a conductor?

A To notify the people that I was working with.

Q Did you do so?

A No, sir.

Q Now, you say that Mr. Batchkowsky was struck

* * *

(Witness excused.)

THE COURT: Incidentally, I will also instruct the jury to disregard the colloquy between Mr. Gaus an myself with respect to the angle at which the handle was sticking out of the car. That is not in evidence, and is not in any document that has thus far been received in evidence.

MR. JURON: It is in evidence, your Honor. It is in Exhibit A.

THE COURT: I didn't know Exhibit A was in evidence. All right, then it is in evidence as Exhibit A.

Proceed.

MR. HERBERT: I call James O'Kane, please.

J A M E S F. O ' K A N E, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HERBERT:

Q Mr. O'Kane, by whom are you employed, sir?

A I was employed by the Pennsylvania Railroad as a fireman August 19, 1942. I continued my seniority in the merger with the now Penn Central Transportation Company to the present date.

Q You are presently an engineer or engine man?

A Yes, sir.

Q Were you an engine man back on November 8, 1968?

A Yes, sir.

Q Were you the engine man of a crew which was made up of yourself, Mr. Pryle, Mr. Batchkowsky and a brakeman by the name of Williams?

A Yes, sir.

Q Did there come a time in the early morning hours of November 8, 1968, that you had occasion to arrive at the siding?

A Yes, sir.

Q Was that for the purpose of switching cars at the siding?

A Yes, sir.

Q Mr. O'Kane, do you recall what time it was that you and the crew arrived at this particular plant?

A About 9:45 a.m.

Q Mr. Batchkowsky has told us that his accident happened at about 9:45 a.m.

A Maybe 9:50.

Q Were you a witness to Mr. Batchkowsky's accident?

A Yes, sir, I was.

Q Prior to the happening of his accident, did

* * *

already said he saw Mr. Batchkowsky attempting to close the handle. I don't see how he can do that without touching the car.

Q Did you observe any of the cars which you were pushing in on track 9-B with a handle protruding?

A I did.

Q Where was that car with relation to your engine?

A It was two to three cars ahead of the engine, possibly four. I know it was not definitely the car next to the engine. It was two, three or four ahead of the engine.

Q Did you see any other cars in that string of four cars with handles protruding?

A I don't recall. There might have been doors open without the handle protruding. This one was sticking out noticeably.

Q Did you eventually push these cars in on track B-9?

A We did.

Q And before you entered the plant did the movement come to a stop?

A We stopped at the road crossing just 30, 40 foot from the doorway into B-9.

* * *

THE COURT: Sustained. Don't give any medical opinions. Just tell us what you saw in terms of your actual observations and not your conclusions.

A Well, we had to steer the man up the steps of the engine. I told him to sit down on the seat.

Q Did you thereafter take him over to the train master?

A I immediately called on the train phone, I called the office to get ready to get an ambulance to take him over to the hospital. We brought him immediately right back to Waverly Yard.

Q When you were pushing these cars into the plant, did the protruding handle clear the entrance to the doorway of that plant?

A Yes, sir, it did.

THE COURT: As you were backing up toward the plant, could you see the handle open?

THE WITNESS: Yes, sir.

THE COURT: Before it struck Mr. Batchkowsky you had seen the handle?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: I had seen it previously in the yard.

THE COURT: But at that time you had seen Mr. Batchkowsky trying to close it?

THE WITNESS: Yes, sir.

THE COURT: And as you were backing in you saw it still sticking out so you knew he had not closed it?

THE WITNESS: I saw he couldn't close it, and it was a known condition, your Honor, we knew about the handle.

THE COURT: Thank you.

Q Did Mr. Batchkowsky indicate to you that he knew the handle was open?

A Yes, sir. With a nod of the head or something, I don't remember exactly. It was an acknowledgment of some sort. I forget now after seven years.

MR. HERBERT: Thank you. That is all I have.

CROSS EXAMINATION

BY MR. JURON:

Q Mr. O'Kane, you say that Mr. Batchkowsky nodded his head and he acknowledged something, right?

A There was in my mind agreement, yes, sir, that he acknowledged that he knew about the door handle and I knew about it, we both knew about it, and I

* * *

Q You knew B-9, didn't you?

A Yes, sir.

Q You know it was a close clearance, didn't you?

A Yes, sir.

Q You knew Mr. Batchkowsky would have to stand just in that doorway, didn't you?

A That is a regular move with any brakeman --

Q Excuse me, sir. You knew he had to stand inside that doorway, didn't you?

A Certainly.

Q And you knew also that he had barely two feet from the side of a moving train to the platform wall within which to stand, didn't you, sir? - You knew that?

A No, he had more than two feet.

Q Excuse me, sir. Do you know how wide that platform was from the place that he was standing to the edge of the platform?

A That compartment is larger than two feet.

Q Excuse me, did you know how the width from the wall of the platform to the edge of the platform, did you know what the width was?

A I don't understand what you mean by the wall of the platform.

Q Well, where he was standing --

A That is right, where he was standing.

Q -- was an insert or an indent in the platform, is that correct?

A That is correct.

Q And he had to stand in this place, is that correct?

A Yes.

Q That was the only place he had to stand, is that correct?

A Yes.

Q How much space was there from the edge of the platform to his left to the wall of the platform behind him?

A Behind him was the door.

Q Behind him was a door?

A That is right, sir.

Q I show you this picture. Does that refresh your recollection?

A Yes.

Q Was he standing alongside that platform?

A He was standing here.

Q Was he facing the conductor?

A Yes. Behind him is the door.

Q He was facing the conductor down the platform?

A Yes.

Q Was the left side of him against the platform wall?

A I assume he is right here.

THE COURT: Let the record reflect what he means by right here.

MR. JURON: The record reflects I was showing Exhibit 2, and now I show you Exhibit --

THE COURT: No, no, he used the expression "right here." I think the record should reflect what he means by "right here."

Q All right, sir.

Can you put an X mark, if I may, with a black pen, as to where you say Mr. Batchkowsky was standing when he was struck.

A I don't think I can do it in this photograph.

Q If you can't do it on this one --

A I don't think I can.

Q Very well. Can you do it on this photograph, and I am showing you Exhibit 3.

A X, is that what you want?

Q Yes.

(Witness indicated.)

A Some place in here.

Q Was he standing on top of the platform?

A Or possibly here. No, he was on the ground. Ground level.

Q And did he have his feet up against the base of this platform?

A I couldn't tell that, no.

Q My question --

A I can't see past this door. I can see the man, I can see half of him, three quarters of him. I can't see what he is doing with his left foot.

Q Are you saying with Mr. Batchkowsky standing next to where you put the X mark you were able to see him?

A Right here.

Q Yes, sir?

A Yes, right in there some place, yes. I could see his arm. I could see the signal, that is what I am getting.

Q How much space was there from his left side to the point where the platform ended? Was there more or less than two feet?

A You mean from here to here?

Q I mean from the point, the end of the platform, until where the platform edge is. The width of the

platform.

A If you carry that through it would be at least two foot. Two foot, yes.

Q We have measured it. Would you agree it was approximately 22 3/4 inches?

A Yes.

Q And the clearance from the edge of the platform to the side of the car we have agreed it was 4 inches. Would that be a fair estimate?

A Yes.

Q So you have 26 3/4 inches, is that correct?

A That is right.

Q From where he was standing he couldn't stand flush up against the platform and keep his view of you and his view of the conductor, he had to stand somewhat away from the platform, didn't he?

A He is in a tight spot there, but as long as I can see his right arm --

Q Excuse me, you say he is in a tight spot?

A Definitely.

Q That is an understatement. Now, my statement is this --

MR. GAUS: I object to counsel's statement.

THE COURT: The jury will disregard the

characterization.

MR. JURON: Forgive me. I retract the statement.

Q How far away from the platform would he have to stand to keep his view of you on theoutside and a view of the conductor?

A How far away from the platform?

Q Yes, sir. May I show Exhibit 6. Perhaps it would refresh your recollection.

A As much as he could to clear a car.

Q How far away from the platform would he have to stand?

A A foot.

THE COURT: A foot out from the platform?

THE WITNESS: Yes.

Q Which meant that he had --

MR. HERBERT: When you say platform are you referring to the platform or the wall?

MR. JURON: We are talking about the wall of the platform, aren't we, Mr. O'Kane?

THE WITNESS: I assume that.

Q That means given 26 3/4 inches, and him having to stay one foot away, he had 14 3/4 inches within which to stand, is that correct?

A Yes.

* * *

the case with your fellow jurors or anyone else, and we will see you in the morning at ten o'clock.

(Jury excused.)

THE COURT: If you want to use the time now, Mr. Herbert, to read something that the jury doesn't have to hear you may do so.

MR. HERBERT: The interrogatories was what I have been going to read to them, your Honor, but with respect to the third-party claim, which is going to be tried by the Judge, will you stipulate with me, Mr. Gaus, as to the admissibility of the side track agreements?

MR. GAUS: I think they are already the subject of a pretrial order. I don't see any reason for belaboring the point. There is one point I think that as long as we are on the subject I would like, and that is the lease which is referred to in the pretrial order, I don't know if that is in, so I am prepared to concede the authenticity of the side track agreement, the original and the supplemental, and the lease that was referred to therein.

If I may just get the order, I will be happy to point it out.

MR. JURON: If it is helpful, the supplemental

agreement had been marked by me as Exhibit 12 in evidence.

MR. GAUS: I thought it was in evidence, yes.

THE COURT: There are other agreements, too, the basic agreement.

MR. HERBERT: That is an agreement entered into between Anheuser-Busch and the Railroad, and on the standard form of railroad side track agreement. That agreement was executed in February of 1950 at a time prior to the actual construction of the plant.

MR. GAUS: As I understand it, the thrust and emphasis of the third-party complaint is really not on that standard agreement, I think it goes verbatim in the third-party complaint to the wording of the supplemental agreement. I think that if we look at the third-party complaint the wording is from the supplemental agreement, and I understand the thrust of the third-party complaint to be so. Am I not right?

MR. HERBERT: The thrust of the third-party complaint, your Honor, is that we entered into this special agreement because when plans were submitted to us after we entered into the principal agreement which detailed the plant which was to be constructed, we saw that the plant called for clearances which were not within our minimum standard of 8 feet, and --

THE COURT: All that has been made clear, but do you need the basic agreement, or can we rely on the supplemental?

MR. HERBERT: Not as long as Mr. Gaus is willing to stipulate the standard clearance of the Railroad was 8 feet.

MR. GAUS: I don't know that to be the case. I am prepared to argue that in any event 8 feet is what we are talking about in the area where the accident happened, so I don't know that there is --

THE COURT: Are you willing to stipulate that the normal clearance in the standard side track agreement is 8 feet?

MR. GAUS: May I have a moment to ask a question. I haven't been addressing my attentions to the standard side track agreement, I have been going on the supplemental agreement under the belief that that is what was relied on in the third-party complaint, and that that is what would be relied on herein. If the condition pointed out to me, I might even be willing to so concede.

MR. HERBERT: It is referred to in correspondence that has already been read into evidence, and I can call to the Court's attention the letter of June 27, 1950,

from Anheuser-Busch wherein they did acknowledge that the standard clearances were 8 feet. This was in connection with a request for a revision of the wording of the supplemental agreement, and they took exception to the wording in the supplemental agreement and made some suggested changes where they deleted the words from our proposed supplemental agreement such as "dangerous" and "close clearances" to"6 foot one inch clearances", and they wrote us in 1950, June 27, that "We feel it is entirely proper that we should hold the Pennsylvania Railroad harmless against any claims for damages to property and persons injured in consequence of the existence of 6 foot one inches clearances instead of the standard 8 foot clearances." I would like to get a concession that the standard clearances were 8 feet, and that was the very reason why it became necessary to enter into this supplemental agreement.

THE COURT: I will say this, Mr. Gaus. In case you want to review the agreement we will assume that you will stipulate unless after reviewing the agreement you discover that it does not in fact refer to a standard 8 foot clearance.

MR. HERBERT: I don't think that supplemental agreement in fact --

mdkm

THE COURT: I am talking about the standard side track agreement.

MR. HERBERT: The standard side track agreement does refer to the standard regulation of the Railroad, and as a matter of fact there was read into evidence already, your Honor, a memorandum which referred to these less than standard clearances.

THE COURT: You just read some.

MR. HERBERT: I am reading one which Mr. Juron read to the jury, your Honor.

THE COURT: You don't have to. I remember all of that. The only question is whether you need the standard side track agreement in view of the fact that we are operating here under the supplemental agreement and my understanding is you said the only thing you really wanted it for was to prove that the normal clearance is 8 feet, and Mr. Gaus was asked to stipulate that, and he said he wants to look at the agreement. I am assuming that he will stipulate it if in fact the agreement does say that.

MR. GAUS: Right. If counsel will point it out to me in the agreement, I think the agreement is only two pages. He knows the agreement better than I do, and if it so says 8 feet I will be happy to stipulate.

But in that connection may I call your Honor's attention to one thing that does occur here. Mr. Juron has read a number of memoranda that existed or passed between the Philadelphia office and the New York office of Pennsylvania Railroad, having nothing to do with Anheuser-Busch, and this was when one branch of the Pennsylvania Railroad was seeking permission from the other branch of the Pennsylvania Railroad, I think it was Engineering seeking the Legal Department's okay. I maintain that this is not binding -- these are matters that existed ex parte on the Railroad, and that when we are talking about evidence of Anheuser-Busch in the intramural transfer of memos I don't know how I can be bound by that.

THE COURT: You didn't object at the time they were introduced.

MR. GAUS: I am sorry, insofar as -- in fact, in chambers I maintain I made my position clear that insofar as what transpires here, and parole evidence on matters which are outside the scope of whatever agreement existed between the Railroad and Anheuser-Busch, would be ones that your Honor would take cognizance of. You said that it was not necessary for me to specify, you would be aware of those items.

mdkm

THE COURT: That is a different objection. The objection that in construing the supplemental agreement I don't have to look behind that agreement to the correspondence and memoranda that were prepared or sent during the negotiation of the supplemental agreement. That is a different objection than the objection that you are not bound by hearsay statements in intramural memoranda, because those statements have all been read to the jury now without any objection.

MR. GAUS: It was my intention to explain the situation in view of what transpired merely to ask during your Honor's instructions to the jury, since in the first place they are not going to be involved with me anyway, but that they be instructed as to this intramural transfer of memoranda, one department of the Railroad with another, and that not --

THE COURT: Since they are not going to decide anything at all with respect to you, then I don't think that --

MR. GAUS: I am not particularly upset. In fact that is one of the reasons I didn't object at the time, because it was so intramural and for that reason I don't press the point.

MR. HERBERT: I don't think all the items that

were read to the jury were inter-office memoranda. There were some correspondence read to the jury, and particularly a letter of May 2 to Hartley, Killington and Day, who were the architects for Anheuser-Busch, and their agents, and that memo was read to the jury.

THE COURT: I don't necessarily buy your conclusion that the architects were the agents of Anheuser-Busch. In any event, the documents are in evidence now, they have been read to the jury, and Mr. Gaus says he doesn't object to them being in for that purpose. He is only repeating his objection that I not consider them in violation of the parole evidence rule.

MR. Gaus; That is right.

MR. HERBERT: I am not asking the Court to consider them in violation of the rule, I am asking the Court to consider them to assist in arriving at what the parties intend to cover.

I am not seeking to contradict the terms of the contract, but when we use the words 6 foot one inch clearance, that is with the understanding, your Honor, that this is less than standard, and we required certain conditions before we entered into the supplemental agreement, and the agreement specifies what the conditions

were. We in effect said that we will operate on this siding with a 6 foot one inch clearance on condition that Anheuser-Busch put up signs warning our employees of the close clearnace, and, two, that they indemnify us if there is any injury to an employee caused in whole or in part by reason of the 6 foot one inch clearance.

MR. GAUS: We are getting far afield from the point we addressed ourselves to, and that is what the agreement for the side track apart from the supplemental. I now have it, your Honor, and I am looking at it, and I don't see where it says 8 feet, so when Mr. Herbert asks me to concede something that is beyond that side track agreement I think there is enough referring to 8 feet, but I do not believe it is a part. I am reading the paragraph on clearances, and this is from the agreement, the side track agreement which I assume he is talking about when he says it is the original agreement.

MR. HERBERT: Correct.

MR. GAUS: If I may read, it says, Clearances, paragraph 7. "The industry agrees not to permit any obstructions over said side track less than clearance regulation above the top of the rail or alongside of said track less than clearance regulation from center

of the track with the necessary conditional clearance on curves. The industry will ob[illegible]ve and comply with all rules and regulations of the Railroad Company governing the handling of inflammable liquids, including loading and unloading of cars, the location of tracks," -- I am not sure whether it is track[illegible]r racks -- "and storage tanks, and protection of all sidings from danger due to stray electrical currents" and that is the complete quote of paragraph 7 that is headed Clearances.

MR. HERBERT: Your Honor, the clearances referred to in the original agreement make reference to less than the clearance regulation above the top of rail or alongside of said track less than clearance regulation.

The clearance regulations I am prepared to come in and show were standard regulations system-wide of the Pennsylvania Railroad, to wit, 8 feet. I can get an engineer, if I have to, to testify --

THE COURT: Why don't you show that to Mr. Gaus and ask him to testify that is what the regulations are.

MR. HERBERT: I can show him correspondence where they were also advised that our regulations were

in fact 8 feet, and I can show him a letter from Anheuser-Busch which says we agree we should indemnify you --

THE COURT: Mr. Herbert, believe me, there is no virtue in repetition.

MR. HERBERT: I agree.

THE COURT: We are at the point now it is a foot below ground level. I understand what you are saying. Give Mr. Gaus a chance to look at the regulations and perhaps he can stipulate the regulations called for a regular 8 foot clearance. If he doesn't so stipulate, then you can call in an engineer or architect to so testify.

MR. GAUS: I am prepared if they called an engineer -- even this document could go into evidence under the sponsorship of an engineer, and with that concession I think we have covered whatever we have been talking about for so long, and I reserve then of course. I think your Honor is aware of my position that the 8 foot clearance was in fact there where the accident happened.

THE COURT: All right.

It is stipulated by Mr. Gaus that if an engineer were called to testify on behalf of Penn Central

he would say that the standard clearance is 8 feet.

All right, see you at ten o'clock in the morning.

MR. GAUS: Your Honor, there was one photograph not marked for identification. Can we have that marked so there is no question?

(Third-party defendant Anheuser-Busch Exhibit D marked for identification.)

- - -

(Adjourned to January 29, 1975, at 10:00 a.m.)

MDpa 1 334

MIKE J. BATCHKOWSKY,

Plaintiff,

vs.

PENN CENTRAL COMPANY a/k/a
PENN CENTRAL TRANSPORTATION COMPANY, 69 Civ. 866

Defendant & Third Party Plaintiff,

vs.

ANHEUSER-BUSCH, INC.,

Third Party Defendant.

January 29, 1975.
10:15 a.m.

(Trial resumes.)

(In open court, jury present.)

MR. JURON: Dr. Burton, please.

M U R R A Y B U R T O N , called as a witness on behalf of the Plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JURON:

Q Dr. Burton, are you a physician licensed to practice medicine in the State of New York?

A I am.

Q When were you licensed to practice in this state?

A 1949.

Q Prior to being licensed in this state, can you tell us where you received your medical education and training?

A At the University of Rochester, and the New York University, College of Medicine, in New York.

MR. HERBERT: The defendant will stipulate that Dr. Burton is a qualified orthopedic surgeon.

MR. JURON: I appreciate that, but I would like to have some of his background.

THE COURT: Briefly.

Q Tell us briefly where you received your continuing medical training and if you received training in a specific field of medicine can you tell us what field that was and where you received such specified training.

A At the Bellevue Hospital in New York, the Hospital for Joint Diseases, prescribed course of residency training in orthopedic surgery, certified specialist in orthopedic surgery in 1956, certified specialist American College of Surgeons, 1957, Fellow of the American Academy of Orthopedic Surgeons, Fellow of the New York Academy of Medicine, and Assistant Professor of Orthopedic Surgery at Mt. Sinai Medical School. I am Chief of the Adult Division at Mt. Sinai and attending orthopedic surgeon at Mt. Sinai and the Hospital for Joint Diseases.

Q Are you a diplomate in orthopedic surgery?

A I am.

Q What's a diplomate in orthopedic surgery?

A It's a specialist certified by the National Certifying Organization in orthopedic surgery, and you are awarded your diploma after a prescribed course of training and practice and taking various examinations.

Q Those examinations are both written and oral?

A Correct.

Q Are you passed upon by those specializing in the field in which you aspire to become a diplomate?

A That's correct.

Q Are you presently connected with any hospital?

A Mt. Sinai and the Hospital for Joint Diseases.

Q In what connection?

A I'm attending orthopedic surgeon.

Q Are you presently actively engaged in orthoped surgery?

A I limit my practice to orthopedic and traumati surgery full time.

Q Did there come a time some years ago, doctor, that you were consulted by a patient known as Mike J. Batchkowsky?

A Yes.

MDpa 4 Burton-direct

Q Do you require the documents and papers in front of you for the purpose of refreshing your recollection?

A I do, because it's quite awhile ago.

Q Will you please refer to those papers where necessary to refresh your recollection.

Firstly, can you tell when it was you were first consulted by Mr. Batchkowsky and what he told you at that time?

A I saw him for the first time on November 20, 1968 in my office.

Q Did he at that time give you a history of what happened to him?

A Yes, sir.

Q What was that history, briefly, doctor?

A He said that he had been injured on November 8, 1968, in Newark, New Jersey, and he described the fact that he had been struck by some protruding door handles, spun, knocked around, and then struck again and knocked to the ground, sustaining injury to his neck, his chest, his shoulder, and a laceration of his forehead.

Q Did he tell you at that time that he had received some medical assistance?

A Yes.

MDpa 5

Q Where was that and what was that medical assistance?

A He was taken, I believe, to the Elizabeth General Hospital where he received emergency room treatment, the laceration of his forehead was repaired, he was given a tetanus injection, dressings were applied to his other injuries and then he was released.

Q Did he indicate to you whether he received any other medical attention from that time, that is the time that he left the emergency department of the Elizabeth General Hospital, until the time that he saw you some days afterwards?

A Yes, sir.

Q Where was it that he received such further medical treatment and what did that consist of?

A He had the sutures removed from his lacerations at the railroad medical facility in Pennsylvania Station, and he was I believe given medication by the railroad doctor at that time.

Q When he saw you some days later did he have any complaints that he told you about?

A Yes, sir, he did.

Q What were his complaints?

MR. GAUS: Before he answers that I think

the doctor did have a particular paper with reference to the last two questions, in his hand. I wonder if I could ask to have that marked for identification.

THE COURT: You may.

(Plaintiff's Exhibit 22 marked for identification.)

Q What were his complaints when you saw him for the first time?

A He had complained of pain in his forehead, headache, pressure feeling in his head, pain in his neck, pain in his chest, pain on coughing, pain in his lower back, pain in his left upper extremity.

Q And at that time did you proceed to examine him?

A I did.

Q Can you tell us if you would, doctor, what did your examination consist of and what if anything did it reveal to you?

A He was fully undressed and his entire body was subjected to orthopedic scrutiny. He had a relatively recent three-quarter inch scar on his forehead, this was tender, it was adhering, it was reddened, there was a black and blue area about it. There was moderate tenderness about his neck, limitation of movement of his

MDpa 7 Burton-direct

neck was rather substantial. He had substantial, at least 50 percent defects in rotation and bending. There were crepitating, crunching sounds on moving his neck, and tenderness about his shoulders with limited motion. He had an abrasion scar about his chest which measured two by two, two inches by two inches, approximately over the ninth rib. He had pain on pressing his ribs. At that point I took various x-rays, we took x-rays of his neck and I attempted to take some x-rays of his chest as well, to try to demonstrate ribs. The x-rays showed rather substantial degenerative change in the neck, osteoarthritic changes from the lower vertebrae. There was no evidence of neck fracture. There was a suspicion of a fracture of the eighth and ninth ribs, but I couldn't demonstrate it without any question on my films.

Q Did he tell you what his age was at that time?

A Yes, sir, he did.

Q What was that?

A He was 53at that time.

Q Can you explain to us the significance of the osteoarthritic changes with respect to a man of that age?

A Anybody who gets to be 50 and some odd years

developes some degree of osteoarthritic changes. This is part and parcel of growing older. The amount of changes he had at that time were basically consistent with a man of his years, not any special amount.

Q By "consistent" would I be correct in paraphrasing that it was nothing unusual?

A Correct. If you were to take 100 people and x-ray their necks this would be the average amount to be anticipated in a man of his years.

Q Did Mr. Batchkowsky indicate to you the kind of work he had been doing and the period of time that he had been working?

A Yes, sir.

Q What was that, doctor?

A I believe he was a car checker.

Q Did he indicate how long he had been working?

A He told me that he hadn't lost any time in 18 years, that he hadn't been out of work in 18 years, so I assume that he was at work in this occupation for at least that period of time.

Q Having examined him and having found what you just described, can you tell us what significance those findings had with respect to the overall condition of the man?

A He was disabled and he was in pain, and he had pain from his neck, pain from his chest, pain from his left shoulder, pain from his back. He was in considerable discomfort at that time.

Q Considering the nature of his employment, and the condition of physical -- the physical condition you found when you first examined him, would you say he was able to do his job at that time?

A At that time he was not.

Q At that time did you prescribe a course of treatment?

A I did.

Q What was that, doctor?

A I gave him some medication for pain, I advised the use of heat at home, I told him to go home and get into bed and stay there, I gave him medication for sleep, I gave him a special kind of anesthetic liniament for him which he was to apply to the sore areas, and I gave him a bandage to wrap around his chest to try to support his rib.

Q Did you tell him to come back?

A I did. I saw him, let's see, this was November 20th -- I saw him on December 13th.

Q With the nature of his --

A I'm sorry, November 29th was the next time.

Q Were the nature of his injuries such as to in your opinion require a course of treatment, a course of visits and treatment by you at your office?

A Yes.

Q Did you prescribe such a course of treatment for him at your office?

A Yes, I did.

Q Can you tell us, doctor, the period of time that this course of treatment took place, the frequency, if you would, of the visits, and the nature of the treatment that you gave him during those visits?

A I ordered a neck brace for him.

Q What's the purpose of a neck brace?

A To hold up his head and to relieve the muscles of the job of holding up his head. These are commonly used type of cervical collar, which was ordered and obtained for him and which he wore constantly. I also gave him various injections about tender areas, cortisone injections about the shoulder and into the neck muscles which sometimes is very helpful. He was seen on November 29th, at which time he was injected, collar was obtained for him, he was re-injected on December 6th, the same complaints of pain in the shoulder, pain in the neck.

MDpa 11 Burton-direct

He was seen on December 13th, again severe complaints of neck pain and shoulder pain. He was injected to try and relieve the pain in his ribs, and he had what we call an intercostal block, which is a nerve block of one of the nerves which run under the ribs, and that is sometimes effective in relieving pain coming from a rib.

He was seen on December 20th. Collar was adjusted because it was bothering him. He still had substantial rib tenderness. I thought he had a fracture of his right seventh and eighth ribs at that point. I again gave him medication.

I saw him pretty much steadily thereafter periodically. I saw him on January 13th. His neck felt somewhat better. His right rib cage was still moderately sensitive. I still couldn't demonstrate a fracture on x-ray. I advised continuation of medication and treatment and he was still disabled at that time. I saw him on February 12th, he still had pain in his left shoulder with a sensation of numbness of his arm.

He had pain in his ribs, but it was somewhat better. He complained of cracking and grating sensations coming from both his ribs and his neck. Examination showed a substantial loss of neck movement. Pain on motion of his left shoulder. Exquisite sensitivity to even the

slightest touch about the shoulder. And he was re-injected and again given further medication.

I saw him again on March 5, 1969. Severe complaints of neck pain and shoulder pain. Still had tenderness about his ribs. Collar was re-adjusted. Marked loss of neck motion. I injected him at one time. I suggested that he try to go to work in a month, and he said that he would make that attempt.

Q To your knowledge did he go back to work, or try to go back to work sometime thereafter?

A I think he did. I have a notation here, I will find it in a moment. I saw him on April 7th. He was not better on April 7th. He still had pain in his neck, his left shoulder was somewhat improved. I suggested that he then get some cervical traction and he is to make arrangements to purchase a traction unit.

Q What is a traction? What's the purpose of traction?

A It's a method of a hanging weight with a force applied to the neck to try to stretch it out. It's sometimes useful in relieving muscle spasm and tenseness. And it was at that point that I felt that cervical traction would be of some benefit to him.

Q Did he obtain cervical traction?

MDpa 13 Burton-direct

A Yes, he did.

Q And was that administered by you or was it self-administered?

A No, it was administered at home under my direction, specification, and monitoring.

I then felt that he could return to work on or about May 26, 1969, and I believe he went back to work May 28, 1969.

I saw him on June 6th, about a week after he had gone back, and he had been using the medication I gave him. He still complained of pain in his ribs. Neck motion was still restricted. There was still tenderness about the shoulder. I felt that he could continue to work and still medicate and treat himself at home.

Q To your knowledge, did he resume doing the same duties that he had been doing before the accident or was he in any way limited?

A As I recall, I wrote a note for him at that time asking that he be given lighter work. I don't really know at this time whether he actually was.

Q After that did you see him at any time?

A I did.

Q Can you tell us when the next time was, and what your findings were then?

A The next time I saw him was July 20th, and at that point he told me that he was working on and off, he was losing time, he couldn't do his regular work, he couldn't sustain his employment. He said he was not able to rotate his head to the left, he was able to rotate it to the right. He said that he had difficulty in climbing up on ladders, which they were asking him to do, and he couldn't do it.

He had marked limitation of neck motion, spasm, tenderness; again, I felt that he was partially disabled, that he could do some work at that time but not arduous work.

Q Was he still receiving treatment?

A Yes.

Q What was that?

A I was giving him medication.

Q What was it?

A He had headaches and I gave him a medication called Fiorinal.

Q Was he still wearing a collar at that time?

A Yes. I think he even slept with it and was wearing it steadily.

Q Did he discontinue the traction at that time?

A I don't know. I don't have a record.

MDpa 15 Burton-direct

Q After that did you see him again?

A August 29th, he was slightly better, he complained of some pain on neck motion. His shoulder was somewhat improved. Nurological examination was normal. I felt that was some benefit from the medication, and I gave him further medication at that point. Then I saw him September 29th, which is a month later. He wasn't working. I have a notation that he was rejected by the company physician.

Q What was his condition?

MR. HERBERT: Note my objection to that, your Honor, as to what notes he may have.

THE COURT: Sustained.

MR. HERBERT: I ask the jury to be instructed to disregard that remark.

THE COURT : The jury will disregard any reports made by the patient to the doctor concerning what other people told him.

Q What were his complaints at that time, doctor?

A He had marked complaints of pain on neck rotation, and pain in his left shoulder. I saw him September 29th, when I said he could go back to work, light work, on October 1, 1969, which was just a few days later.

Q After that, did the examinations and treatments continue?

A Well, they got less and less frequent.

Q When was the next time?

A Then I saw him on May 18, 1970. He told me that he had been losing time regularly, he was working only three days a week, and that the minute he tried any activity his neck became more painful. Examination showed severe restriction of neck motion, worse than it had been, with muscle spasm and pain, mobility of the shoulders was restricted, reflex activity indicating the integrity of the nerves was now diminished, and there was loss of sensation in the right hand in a patchy distribution. At this time I thought there was evidence of a so-called nerve pinching in the neck with pain radiating into the upper extremitites. This was about the first time that I picked up any difficulties in sensation in his hands.

Q By loss of sensation can you explain what you mean?

A It just doesn't feel proper, it feels as if the hand is asleep. There is a patchy area of numbness and one is always rubbing the hand to bring the feeling back.

Q What causes that?

A It's partial pressure on the nerves that run to the hand in the neck area and it more or less goes hand in hand with loss of motion. The more loss of motion the more tenderness and spasm in the neck the more difficulty with the extremities.

Q You said something about spasm. What's that? Is that a voluntary or involuntary thing?

A Spasm is an involuntary state of a muscle in which the muscle is tight-working when it should be relaxed. It's a protective reaction on the part of the body to keep a part that is hurt from moving.

Q Can an examining physician actually feel or see that?

A Not only can you feel it but you can see it. A muscle which stands out like a rope when it shouldn't stand out like a rope is a spastic muscle and as I said, it's involuntary, not under the direct control of the patient.

Q Will you please continue, doctor?

A Again, I suggested the use of a collar, the use of traction at home, and at that point I changed my prognosis, I felt that it would be guarded, that the likelihood of recovery in this gentleman was very questionabl

Q Prior to that time what was your prognosis?

A I thought that on the basis of what I had seen there still was a chance he could recover better than he was. At this time it was apparent that he was developing additional findings which made the prognosis poorer. The chances of getting better were substantially worse.

Q At that time what did you do for him or what did you prescribe?

A Again, I told him to increase the weight and to wear his collar more and gave him more medication. In other words, to try to increase what he had been doing rather than decrease it.

Q Did that help?

A Well, I saw him next on -- let's see, that date was May 18, 1970.

Then I saw him on August 9th, -- let me make sure I have the next date. I saw him on May 18, 1970. Then after that May 17, 1971. It was almost a year. He had been working, losing time, he said. He still had complaints of neck pain, unable to sleep on his right side, unable to rotate his head, had complaints of pain in his left upper extremity. He also had an area of marked tenderness about his right elbow, was given an injection, given medication for pain, I told him to come back in three months.

Q He was still taking pain killers at that time?

A Still taking pain killers. I saw him August 9, 1971. He said his neck bothered him all the time and that it was particularly bad during a rainy spell. He also had pain in his left arm, left elbow, physical findings were basically unchanged except that gripping power now was reduced, he couldn't squeeze as hard as a big, burly fellow and the gripping power of his hands was substantially less than it had been.

Q What would cause that?

A Again, the lack of proper nerve supply to the muscles involved, and gripping power was substantially reduced. I gave him an injection into his left elbow area, I told him to modify the traction he had been getting, and to work as much as he could on the basis of whatever he felt he could do. After that he kept writing me letters in between visits advising me as to his progress and signed himself Broadway Mike. I saw him on April 25, 1972. Findings basically unchanged, and had very little relief from the traction and very little relief from the irritant rub that he had been using, wore his collar occasionally.

MR. GAUS: I ask that the papers presently being referred to also be held and marked for identification.

MDpa 20 Burton-direct

Incidentally, there was a date given in 1972 I didn't get. I wonder if I could ask for that.

THE WITNESS: 1972, sir, was April 25th.

THE COURT: Doctor Burton, if you will hand to the clerk--

THE WITNESS: The entire record, sir?

THE COURT: Just the papers you referred to.

THE WITNESS: I have referred to them all practically.

THE COURT: Then we'll mark them all as a group.

(Plaintiff's Exhibit 23 marked for identification.)

Q When you saw him in April 1972, was he working at that time?

A Idon't believe he was.

Q After April 1972, did you continue to see him at any time?

A Yes, sir. I saw him May 31st, 1972, at which time he came in complaining of numbness of his right hand, pain and numbness in his left elbow, marked loss of neck motion, weakness of grip, and on examination he had marked loss of neck motions. His neck was absolutely rigid. He had weakness of grip. There was diminished sensation and reflexes. As far as I was concerned this was

now a chronic long-lasting situation, and I didn't think there was anything else I could do for him but just give him further medication.

Q Was his condition getting worse or was it static or was it getting better?

A It was actually substantially worse than it had been as far as weakness and numbness. The numbness was spreading. And the loss of motion, he would now rotate his body by moving -- rotate his body by moving -- rotating his neck by moving his entire body, no longer capable of independent neck rotation.

Q Was he still taking pain killers?

A He was.

Q To your knowledge, was he still taking any form of exercise for his neck?

A He was just using the hot-wet packs which he had been doing at home, and the traction had been bothering his jaw because he has no teeth, and this does tend to become painful after awhile and I believe he discontinued it at that point.

Q Was he still using a collar from time to time?

A On and off.

Q Did you prescribe any further treatment for

him or do anything else for him?

A Well, I just -- as I said, there was very little I could offer him at that point other than to admit that this was a chronic situation.

Q Was there anything that could be done medically for him at that time, to your knowledge, anything to help, to your knowledge?

A Nothing that was practical. This was a totally rigid neck, and it's just not the kind of problem that we can really successfully handle.

Q Did you see him after that?

A I saw him in July 16, 1974.

Q Any change of his condition?

A Well, he told me he hadn't worked at all since 1972, and that his neck bothered him, his right shoulder, his left elbow. He wears a collar intermittently. He said he had been doing what I told him to but notes no improvement. Again, there was substantial loss of neck movement in all directions. Findings were basically the same. There was still weakness of grip, still loss of sensation. I felt this was now permanent and there was nothing substantially I could offer. I just saw him recently on January 20, 1975. He had been doing everything I told him to, taking the medication periodically, treating

himself, and now the neck was almost completely rigid, definite weakness of his shoulders, loss of shoulder motion; again I felt that he was totally disabled, and that he had a substantial degree of degenerative change in his neck. I took some x-rays on January 20, 1975 of his neck.

Q What did those x-rays show, doctor?

A Well, I took films in the bending backward and bending forward position to see if in fact there was any motion of the neck, and even though the man's chin goes up and down I am able to superimpose these films exactly and by superimposing the films one is able to demonstrate quite clearly that there is absolutely no motion in his neck. On the bending backward film the neck should bend backward. On the bending forward film the neck should reverse itself and bend in the opposite direction.

Q If those x-rays were pl[illegible]d in a shadow box do you think we as lay people could get some better idea?

A I have grave doubts you would, because they have to be superimposed and I did this yesterday with a very bright spotlight, and the two curves are identical, which means that on a forward position in the bending backward position it doesn't move. It's quite clear.

He also has spurring in the bones are straight as they could be, when they should have a gentle curve. He has osteoarthritic degeneration. He has spurs. These are signs of a far advanced neck arthritis substantially greater than what was present six years ago.

Q Doctor, you have been seeing Mr. Batchkowsky over a course of some six and a half years now, the first time some days after the occurrence of the accident, and the most recent examination of your patient was bearly a week ago. Based upon everything that he told you as to what had happened to him on November 8, 1968, and your initial examination, and the numerous examinations that you had of him, and x-rays and other tests, did you come to a firm diagnosis of what his condition was in November of 1968 and whathis condition is at the present time?

A Yes.

Q Can you tell us what the initial diagnosis was and what the present diagnosis is?

A The initial diagnosis was severe sprain of the cervical area, the cervical spine, with a forehead laceration, a sprain in the shoulder, and a probable fractured rib which I was not able to substantiate and a low back sprain.

The back sprain improved significantly, the laceration of his forehead didn't prove to be anything other than a relatively minor non-disfiguring scar. His neck condition has progressed. His difficulty with his shoulder has progressed. The underlying arthritic change that he had in his shoulder was in my opinion aggravated, and now I have watched over the years a progressive loss of neck motion, much greater than would have occurred on the basis of time alone, and I have seen a man who had an excellent work record for 18 prior years suddenly lose time, time, time, and time, and finally have to stop in 1972 with inability to go back to work since. So this has been a chronic progressive permanent difficulty primarily with his neck and back.

Q Mr. Batchkowsky tells me he should be 60, God willing, in March of 1975. What's the future for this man? Will he be able to function, and if so, what can he do by way of gainful employment, what can he do with respect to the ordinary things a person does around the house, ordinary pursuits of a man 60 years of age?

A I think he has just about reached the plateau. He really hasn't changed too much in the last six months or so, and he has substantial loss of neck motion. As I said, he can't lie down face up on the table.

In x-raying him it was impossible to get him to put his head down, his head was suspended in the air. We had actually to build it up with a pad so we could lie him face up on he table to x-ray him. That's been a change which has occurred over the years. That of course means that lying in bed he is going to have pain in the neck and he is going to require extra support, too. The findings are weakness of his hands, again is progressive. How fast it will progress from now on I can't say.

Q You had told us initially that he had the usual osteoarthritic changes of a man of, say, 53 years of age. Can you tell us what the effect of the trauma, the accident, of November 8, 1968, had on this ordinary osteoarthritic condition that he had?

A There is no question that this gentleman had osteoarthritis of his neck before.

Q Ordinary?

A It was quiet, slow, gradual, as it is in everybody, and it was not preventing him from working at this most vigorous occupation, climbing up ladders and jumping down, etc.

Then an accident superimposed upon this is the same as if one were to take an antique that has many cracks in it, if you left it alone it's fine, it stays

an antique, but subjected to abuse and the cracks suddenly become open cracks. The difficulty with the neck suddenly becomes a matter of clinical importance, and that's exactly what happened.

Q Except for the accident of November 8, 1968, was there any indication that the underlying osteoarthritic condition would have prevented him from doing his regular work for years to come?

A There is no indication that that was the case.

Q In your opinion, doctor, with a reasonable degree of medical certainty, did that accident of November 8, 1968, which he described to you, which happened in the railroad yard, was that the competent producing cause of the condition which you found when you first examined him in November 1968, and the progressive condition which you last observed last week?

A Yes, sir.

Q What's your opinion, doctor?

A That it was.

Q And in your opinion this condition which you have been observing over the course of some six and a half years, and as I said most recently about a week ago, you said something about a plateau. In your opinion, is that permanent?

A Yes, sir.

Q For the treatment that you gave to your patient, and examinations and tests, what was the total reasonable value of your services since November of 1968?

A $810. Of which a balance remains.

MR. JURON: Thank you very much, doctor.

You may inquire.

MR. HERBERT: Your Honor, may I have an opportunity to review the doctor's notes before I cross examine?

MR. GAUS: May we also have the x-rays that he referred to marked, if your Honor please.

THE COURT: You may. There is a shadow box in the corner, if you want to use it.

(Plaintiff's Exhibit 24 marked for identification.)

THE COURT: Perhaps we should take our morning break now, even though it's a little ahead of the usual time.

Let's take a fifteen minute break.

(Recess.)

(In open court, jury present.)

CROSS EXAMINATION

BY MR. HERBERT:

MDpa 29 Burton-direct

Q Dr. Burton, you told us that a man of the age that Mr. Batchkowski was when you first saw him had osteoarthritis of the cervical spine?

A Yes, sir.

Q And that he had spasm.

A Yes.

Q And you felt that was consistent of a man of his years?

A Yes, sir.

Q Is it your contention here that the accident where he was struck in the head and the back, where his head obviously moved, aggravated that osteoarthritic condition?

A Yes, sir.

Q Can a sudden jolting like that aggravate an osteoarthritic condition?

A It sure can.

Q You never hospitalized Mr. Batchkowsky, did you?

A I did not.

Q You never referred him to a physiotherapist, did you?

A I did not.

Q You never referred him to any other doctor

for consultation, did you?

A I don't recall. I may have, but I just don't recall offhand.

I don't believe I did, sir.

Q He was out of work from the day of the accident or the day following the accident up to May of 1969, I think you told us, and he said the same thing.

A Yes, sir.

Q And during that period of time you saw him on nine occasions, I believe, and you gave us the dates?

A I did.

Q Thereafter I think you told us you saw him two, three or four more times in 1969 and once in 1970, in that correct?

A Yes, sir.

Q You thereafter saw him I think you said twice in 1971 and twice in 1972.

A Three times in 1971.

Q What were the dates you saw him, doctor?

A 5-17, 8-9, and 11-8, 1971. Then in 1972 I saw him February 7th, April 25th, and May 31st.

Q Did you see him at all in 1973?

A I didn't see him again, sir, until July 16,1974.

Q Did Mr. Matchkowsky at any time tell you that

he was involved in a bus accident in May of 1970?

A I will check.

May of 1970?

Q Yes.

A I saw him on May 18th. I received no such history.

Q In your 1971 reports, is there any indication of Mr. Batchkowsky's advising you of having been involved in a bus accident?

A No, sir.

Q Mr. Batchkowsky has told us in this courtroom that he was riding a bus in the Port of New York Authority Terminal and the bus in which he was riding crashed into a standing bus and he was thrown forward out of his seat with such force that he broke his teeth, he cut his lip, injured his tongue, and his mouth, and he fell to the floor. Would that, in your opinion, be a competent producing cause or aggravation of a pre-existing osteoarthritic condition of the neck, that type of accident?

A Theoretically it could.

Q How did it come about that Mr. Batchkowsky appeared in your office on November 20, 1968?

A I believe he was referred by a fellow union member that I had treated.

Q Do you know who that was?

A It's been a long time.

Q You have had occasions with some degree of frequency to examine patients that Mr. Juron has as his clients, is that right?

A Not for the past several years but I have seen a number of his people.

Q You have had occasion the last time we were in court, doctor, to testify in a case Mr. Juron had, and that was Mr. Lewis' case?

A Correct.

Q And the time before that you also came in and testified for Mr. Juron in the Hagerman case, is that correct?

A Correct.

Those are two that I can recall.

Q There were a number of others, were there not?

A There may be.

Q This is not the first time we have met in a courtroom with Mr. Juron calling you as a witness, is it?

A There have not.

Q There have been many occasions going back through the years.

A Going back through many years, I assume so, yes.

Q You are not suggesting to this jury, are you, that Mr. -- withdrawn.

Mr. Batchkowsky at the time of the accident was employed as a freight brakeman. You are aware of that?

A Yes, sir.

Q And that his job was coupling and uncoupling cars, switches cargo, hanging from and climbing ladders?

A Yes, sir.

Q After your initial period of treatment did you certify him as being able to go back to that work of a brakeman?

A Yes. He asked me to do so and I did.

Q And as far as you were concerned there was no medical reason why he couldn't resume the tasks of a brakeman as I have just explained?

A No, I sent him back to try it, and that's exactly what he did.

Q Mr. Batchkowsky has told us that he has worked as a brakeman or a car marker since returning to work and that was primarily the work he did up until 1972. Are you acquainted with the work of a car marker?

A I am not.

Q Based upon your examination of Mr. Batchkowsky

is he presently totally unemployable?

A No.

Q And would that be true of 1972 as well as the present?

A Well, it depends what you mean by totally unemployable. A man can answer a telephone, there are sedentary occupations that theoretically at least he could do. A part-time basis. Totally disabled to me means either wheelchair or bed confined so it's a narrow area.

Q Mr. Batchkowsky told us the job of a car marker is to go out and with a chalk chalk numbers on the sides of railroad cars standing in the yard, which he takes from a slip. Is Mr. Batchkowsky able to perform that type of work?

A Just writing numbers on the side of a car, I believe he could do that.

Q Mr. Batchkowsky has also told us that there are various other jobs that brakemen have, to wit, he can be a flagman on a train, and his duties as a flagman on a train is that when the caboose stops he gets out of the caboose, walks back behind the end car, and protects the move. Inotherwords, he flags any trains that might be coming on the same track. Is he able to do that type of work?

A Is he able to wave a flag? I guess he is at this point.

Q He also told us that the brakeman, one of the duties brakemen also do, is to pull pins for car riders. In other words, he will get between two cars which they want to separate to go down an incline and he pulls a lever or a pin. Is he able to do that kind of work?

A I doubt that. It would mean that he would be able to look down and up and to left and right, and he might have to use considerable force with his hands. I think that would be something that he couldn't safely do.

Q Would Mr. Batchkowsky be able to perform the duties of a passenger conductor in passenger services or a passenger brakeman in passenger services?

A I doubt it. I don't think he can stand for long enough periods of time, and the jolting of a train in my opinion he would find very, very uncomfortable.

Q Could Mr. Batchkowsky perform the duties of a messenger carrying a handful of letters?

A Perhaps.

Q From one point to another point?

A Yes.

Q Mr. Batchkowsky in this accident didn't have any fractures, did he?

Q There was a big question as far as his ribs were concerned. Clinically I thought he did have some fractured ribs but I was not able to prove it.

Q You were not able to demonstrate that on x-ray of the ribs themselves?

A He has a barrel chest and it's difficult at times to show each rib. Clinically he had fractured ribs but on x-ray I have not been able to prove it.

MR. HERBERT: Thank you, doctor.

CROSS EXAMINATION

BY MR. GAUS:

Q You have your notes there, doctor, right?

A I do.

Q Doctor, you have brought some x-rays to Court with you and marked Plaintiff's Exhibit 24 for identification -- at least the envelope is so marked -- and I note that there are three x-rays in the folder?

A Yes, sir.

Q Am I fair to assume those are not the complete set of x-rays you had taken of Mr. Batchkowsky?

A No, sir. The original x-rays according to my office were sent to the consultant, Mr. Herbert's consultant, at his request, back in 1969. And they have not been returned.

Q They have been sent in 1969?

A Correct.

They were requested of my office by Dr. Balensweig in 1969, and they were made available to him.

Q You are referring to the ones that you took on November 20th of 1968, I take it, is that correct?

A Whenever they were taken. We got the entire x-ray envelope. We don't have it in the file.

Q Was that only on one occasion that you had taken x-rays of the plaintiff other than the ones you have brought to Court?

A No, sir. We had x-rays taken on January 13, 1969, and x-rays on November 20, 1968. So there were two x-ray examinations, neither one of which I have. I have all his other records.

Q Which of the x-rays, if you can tell us, were sent, according to your office, to Dr. Balensweig?

A The entire x-ray folder, both sets of examinations.

Q What date was that in 1969?

A I got Dr. Balensweig's letter, copy was sent to me, and his letter was -- I can give you the exact date -- in March 1969, March 19, 1969, in which he requested "I would appreciate reviewing x-rays of Dr. Burton," and

after receiving that underlined the x-rays were sent to him. When he got them or when he read them I don't know.

Q Can you give us the date you sent them?

A As soon as we received this. Maybe a week later.

Q So sometime in late March of 1969 --

A Either March or April. I don't have the exact date.

Q All right. Now, you mentioned two sets of x-rays in addition to these. One of them of course would have been taken before that date. What was the other date of the x-rays?

A The date of the x-rays was November 20, 1968, and the second x-rays were taken January 13, 1969. And then the films were sent to Dr. Balensweig either in late March or early April. I don't have that date here.

Q So that between the times of January 13th of 1969, and January 20th of 1975, which is only a matter of days ago, between January of 1969 and January of 1975 no x-rays were taken by you of this plaintiff, is that correct?

A Correct.

Q There were complaints by the plaintiff during this entire period of his neck and shoulders, I take it,

from what you have told us. Is that correct?

A That's right.

Q As an orthopedist interested in the progress of this patient would it not be advisable to have a series of continuing x-rays from which you could compare whatever progress was going on?

A That's a matter of judgment, sir. If I find that I feel x-rays are necessary I take them. If I don't think that they will contribute materially, I don't prefer to x-ray casually.

Q You testified here, Dr. Burton, that the plaintiff came to you initially with an orteoarthritic condition which you determined through those initial x-rays, I believe you said, right?

A Yes.

Q And you told us that over the years down to the last visit here in January of 1975, a couple of days ago, you drew conclusions or prognoses that the plaintiff had progressed through some loss of gripping power and some limitation of motion to the neck and shoulders, and things of that sort, is that correct?

A Correct.

Q During that period of time you told Mr.Juron in answer to his question that the accident on the railroad

was the competent producing cause of the conditions that you have described. Is that right?

A Yes, sir.

Q But you have answered that question based upon what information you had up to the point the question was put to you, right?

A (No response.)

Q I mean obviously you based your answer upon your information.

A Not only on my information but on my findings.

Q And your findings. But until Mr. Herbert informed you of a second accident your information had not included that fact, is that correct?

A Mr. Herbert gave me some rather limited information as to the second accident.

Q And that was the first you had that information, I understand it, because Mr. Batchkowsky did not tell you that he was involved in an accident in 1970.

A That's correct.

Q All right. Mr. Batchkowsky's second accident, for your information, according to what he has told us here, was such that there was a violent collision of buses to such an extent that the bus he was in struck the bus ahead of it propelling it forward, and also propelling him

inside that bus out of his seat, with his mouth coming into violent contact with a rail in front of him to such an extent his teeth were knocked out, and he fell to the floor, and he suffered injuries to his arm and wrists and whatever other injuries involved in the mouth or head from coming into contact with the rail.

Now, I think you have answered the question when put to you by Mr. Herbert that at least with respect to an osteoarthritic condition the other accident theoretically could have aggravated a pre-existing osteoarthritic condition, I think that's what you said.

MR. JURON: I will object to the question because I don't believe Mr. Gaus has given the full facts. The teeth involved here, firstly, were false teeth, and my recollection is that there was no injuries to his head; there were injuries to his mouth when the false teeth broke and cut the inside of his mouth. Now Mr. Gaus is putting to the doctor an item of injury to his head when I don't recall there were any injuries to his head as a result of the bus accident.

MR. GAUS: May I answer that objection?

THE COURT: Please.

MR. JURON: That's my memory, Mr. Gaus.

MR. GAUS: My memory doesn't include testimony

of false teeth insofar as that time is concerned. I do concede I think there is some mention of false teeth of the plaintiff. However --

THE COURT: According to my notes what came out were his dentures and not his natural teeth, and they were broken.

MR. GAUS: I don't wish to belabor that.

THE COURT: They were broken either in the impact or from falling to the floor.

MR. GAUS: We'll remove that and correct our question, doctor --

MR. JURON: I don't believe there were any injuries to his head except for the cuts in the inside of his mouth. That is my memory and I am subject to being corrected on that also.

THE COURT: I don't recall any other injuries to his head other than the mouth.

MR. JURON: That is my recollection.

MR. GAUS: I will confine it to that.

Q Doctor, --

THE COURT: However, to be complete, I understand that the impact was quite severe in that the bus ahead which had been standing was knocked for 15 feet; according to my recollection.

MR. JURON: It was.

Q Doctor, one hears a term whiplash quite frequently in negligence and personal injury actions. You as an orthopedist would be cognizant and aware of the implications of whiplashes, and so on, wouldn't you?

A It's a term that we no longer use.

Q I understand it's growing into disuse, and there may be other terms the medical profession has accepted but I will withdraw the term as such.

MR. JURON: I am quite certain Mr. Gaus would like to pursue some academic medical discussion with the doctor, but I don't think there is any such claim here or in the other case, and unless this point of questioning has some relationship either to this accident or the prior unfortunate bus accident I don't think the questioning is germane.

MR. GAUS: With all due respect to counsel, if your Honor please, I think there has been a speech made by counsel and I don't think it's appropriate at this time, and I --

THE COURT: I am going to overrule the objection.

Q Doctor, Iwill ask you to get back to basics. I think you gave an initial diagnosis of a cervical sprain,

even defined the term sprain yet, and I would ask you, if you would, to do so.

A A sprain is a stretching of the ligaments that hold the joint in place by moving the joint through a range of movement greater than itordinarily would permit. If the sprain continues and the force continues tht results in a dislocation. If it stops short of that the ligaments are partially torn and that is the definition of sprain.

Q In this case your initial diagnosis having been cervical sprain as I understand your testimony, what you initially found to be a cervical sprain had gradually I think would be the way to describe your description of it, came in stages from that initial cervical sprain down to what you described as his present condition, is that not so?

A Correct.

Q And this is superimposed upon his prior osteoarthritic condition?

A Correct.

Q Now we have this situation in addition to whatever was involved in the initial accident -- incidentally, I don't know if your notes -- you gave a history that the plaintiff had given you, I don't know if your notes or your history discloses whether the plaintiff

was struck in the cervical spine by the railroad handle in this case.

A I can tell you what my notes indicate.

Q Let me just take it a step further and then I will ask you, if you will, to take a look and tell us, but as I understood the history that the plaintiff gave you as you reported it was that he had an injury on November of 1968 and he described being struck by protruding door handles. Then it went on, neck, chest, shoulders, and so on. Let me just bring it down to a specific. Did he tell you exactly where the door handle struck him?

A Yes.

Q And what did he say with respect to that?

A He said he was first struck in the mid-back by a door handle which spun him around and then he was hit by a second handle on the forehead.

Q Right. Now, where in medical terminology is the mid-back?

A Between the shoulder blades.

Q Do you call it that or do you have a name for it as far as the spinal column is concerned?

A It would be the dorsal spine.

Q And dorsal spine is somewhat lower in the spinal column than the cervical spine, is that right?

A It's the next one down the line. It's also the area of the spine that the ribs are attached to.

Q What I am really leading up to is that he was not struck in the cervical spine according to what you tell us or what he told you.

A He was struck below and above.

Q Very good.

Now, mention was made of pain in the rib cage, and you suspected possible fracture but were unable to confirm it, is that right?

A Yes, sir. There was a two-inch by two-inch area of black and blue discoloration over the 7th, 8th and 9th ribs, and it was at that area that he complained of pain and it was at that area that I thought he had a rib fracture.

Q That black and blue area is in the nature of a bruise that would be obvious to you as a medical man?

A Yes, sir.

Q Insofar as the fracture is concerned I understand that your x-rays were unreliable insofar as proof either of confirming or rejecting a fracture in that area?

A I wouldn't say unreliable, but I have --

Q It's a poor choice of words on my part. I mean

MDpa 48 Burton-cross

it couldn't, x-rays could confirm?

A Indefinite I think would be a better term.

Q All right, I will say that.

In that connection, doctor, it would be a fact that your treatment wouldn't have materially changed if you had confirmed the fracture or not.

A Actually, I treated him as if he had had a rib fracture.

Q Right. Okay.

So that whether or not he did is problematical, you can't confirm it, but you wouldn't have done anything other than what you did anyway, is that right?

A That is basically quite true.

Q All right. And now if we may take a moment with the arthritis, I understand your testimony to be that people in their 50's normally develope arthritis, is that correct?

A People in their 30's.

Q Then people in their 50's even more so. I would take it, is that right?

A Well, as long as one lives these things keep happening.

Q When does one first start to develop arthritis?

A On the first day of life.

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE
FOLEY SQUARE, N.Y.

MDpa 49 Burton-cross

Q So that we have a very optimistic thing to look forward to.

A The more you get the longer you live, so figure it out.

Q At any rate, certain treatment is given to arthritic patients in the nature of injections, and I think you have already referred to the injections you gave to the plaintiff here, didn't you?

A Yes.

Q One of which of course is cortisone, I think you said you gave him injections of cortisone.

A Yes.

Q Do you know how much by way of treatment by that medication you gave him?

A I believe I testified as to the dates and times I gave it to him. Periodically during the course of treatment.

Q Right. In other words, what I want to ask you, you did testify, and you mentioned the injections, and I don't propose to go back through a repetition of each of your visits, but there were some visits where you referred to injections without identity and at other times you referred to the injections as cortisone. Am I fair to conclude that when Mr. Batchkowsky came to you with his

MDpa 50 Burton-cross

complaint of pain in the neck and shoulders, etc., that an injection was given and the injection was cortisone, is that a fair conclusion?

A Combined with a local anesthetic.

Q All right. So Mr. Batchkowsky was in that sense really being treated with the medical treatment for the arthritis?

A Treated for the pain he had in these areas.

Q Plus the pain?

A Right.

Q Now, I think you indicated that your visits did not include, or his visits to your office did not include any in 1973, is that right?

A No, sir.

Q So that there was a concentrated group of visits following the accident in 1968, and then into 1969, but he had returned to work on your advice sometime in 1969, I believe it was in May, was it not?

A Yes, sir.

Q Incidentally, at your advice, also, as I understand it, Mr. Batchkowsky in March of 1969 obtained a collar?

A Yes.

Q That collar I take it was also a device that yo

employed or advised for the relief of whatever discomfort occurred in the cervical spine area and adjacent areas?

A Yes, sir.

Q At some point you also had advised or suggested traction, but this was something that was carried on at his home under his own application. I take it that you did not go to his home and apply it, you advised him when he was in the office as to how to use it.

A We instructed him in the method of applying the traction at home.

Q In point of fact, you know to what extent the cervical collar was used?

A He wore it incessantly. In fact it got to the point where I had to tell him to take it off for sleeping and for bathing and for washing.

Q Of course, you would have the opportunity to see it since he would I assume wear it into your office, is that right?

A Correct. I kept padding it because it was worn so much that it cracked, and I have a notation that I had to repair the collar and add special padding because it was irritating his neck.

Q Do you have any notes relative to 1970 visits following May of 1970 with respect to the cervical collar?

A May of 1970?

Q Or thereafter. Shortly thereafter.

A Well, October 12th of 1970 I said that he's to use his collar intermittently. In other words, on a good day leave it off, on a bad day put it on. And the same with the traction.

Q Insofar as the traction is concerned in point of fact your only knowledge of that would be -- you have no direct knowledge, I take it, as to the number of times that he used that.

A No. He was given a schedule and the schedule consisted of approximately a half hour in the morning and a half hour in the evening with an additional session added if his pain was particularly bad.

THE COURT: Would excessive wearing of the collar cause a person's neck to suffer restrictions of movement?

THE WITNESS: It's hard to say, your Honor, but a patient developes a tremendous dependence on the collar, and they are actually afraid to move the neck if you take it off, so it's possible to confuse it. That developed in this gentleman, I might add.

MR. GAUS: I don't know if Your Honor is finished with the questions there.

THE COURT: Just one more question I wanted to ask.

MR. GAUS: I think I understand your Honor's question, and I will defer.

THE COURT : Go ahead, if you want to folow that up.

Q In the follow-up to his Honor's question about either as to the dependence, as you say, is there a term known as atrophy?

A Yes.

Q Are we talking in some degree at least of atrophy in the excessive use of the collar or dependence on the collar?

A Wel, atrophy around the neck is almost impossible to measure because it's just not a circumference that one can measure easily.

Q I understand, but generally speaking --

A You mean wasting of muscles.

Q Yes. In other words, maybe we are talking of a term that we haven't yet defined, so maybe if you would would you define atrophy?

A Atrophy merely means a reduction in the size of a part because of either lack of use or lack of proper nerve supply. It gets smaller because it hasn't been getting

either the proper use or sufficient use.

Q Exactly. In other words, if I stopped using my right arm the muscles in that right arm would eventually atrophy?

A Correct.

Q I understand your answer that insofar as the neck is concerned there is some difficulty in measurements to determine the degree. I take it it would be the degree of atrophy that you would be taking the measurements for?

A Yes, that's correct.

Q So that in line with his Honor's question about the use of a collar and the continued and steady use of a collar, are we not talking about something that would lead to in some way or another, and we don't know the degree because you can't measure it, but we are talking about atrophy, are we not?

A You are. As far as the neck itself is concerned, it's a term that I don't find particularly useful.

THE COURT: I was not talking about atrophy. I was talking about restriction of movement due to immobilization of joints.

THE WITNESS: Is that a question, your Honor?

THE COURT: That is what I was talking about. Did you so understand my question?

THE WITNESS: I did.

MR. GAUS: I am sorry if I took it in the wrong direction. Let me follow that then with your Honor's permission, if I may.

Q I may have been assuming, doctor, that restriction of motion might be a part and parcel of atrophy, and if I am using the wrong term I would like to continue so that we are encompassing what's other than was referring to, and basically I don't think there was really a large difference in what we are asking. The effect, whether we call it atrophy or whatever else, the restriction of motion of the neck, is that affected by the continued use and prolonged use of a collar which immobilizes muscles?

A What you say in fact does not actually work out. A man can wear a collar for an extended period of time. The collar isn't rigid immobilization because if there is motion in the neck in chewing, in eating, the neck does have to give, does have to have some motion. I can't possible immobilize the neck rigidly without immobilizing the head at the same time, so any restrictions of movement that you find after removal of the collar are not

MDpa 56 Burton-cross

due to the collar itself or to the prolonged use of the collar but are due to the basic restrictions built into the neck motion itself.

Q Say with a cervical sprain, you have talked about some spasm in your testimony.

A Yes, sir.

Q Was there spasm involved in the particular case here at hand?

A Absolutely.

Q Did you see spasm when you first saw Mr. Batchkowski?

A I did.

Q And spasm, as you have told Mr. Juron, is a knotting of the muscle?

A That is a protective state of the muscle to prevent movement.

Q Would you agree that's a contraction of the muscle, or a muscle that knots is contracted, is it not?

A I would.

Q Now, your conclusion about it being voluntary is one, I take it, that you as a physician with extended experience is able to conclude insofar as voluntary or involuntary is concerned, is that right?

A It's not possible to create muscle spasm

voluntarily. I can contract a muscle voluntarily, but I can't keep it upmore than a matter of just a few seconds. An involuntary spasm of a muscle can be there for life. It can stay 24 hours a day, be there for life.

Q Right. But contraction can be voluntary or involuntary, as you say.

A There are certain muscles that are under your control and certain muscles that are not under your control. You can't tighten your trapezius muscle voluntarily. It's a group reaction and it's very difficult to do as a single muscle. The muscles of the hands and shoulders can be contracted individually. The muscles of your back cannot. Muscles of your neck cannot.

Q Is it your testimony that the trapezius muscle cannot be contracted voluntarily?

A It can be contracted, but not in the way that one finds in a neck sprain. The trapezius muscle actually consists of three separate divisions, and I can tighten one division without tightening the other voluntarily, but in a spasm of a trapezius muscle the whole muscle is like a rock. I can't, me personally, I can't do it. Maybe there are some people that can but I can't.

Q How about a gentleman who has been working

for some 18 years or 12 years, I am not sure how many, but take the lower figure, 12 years, climbing on and off of ladders of trains, in which the shoulders and arms are used to assist in pulling his weight on and off, isn't that a kind of work that involves the use of the muscle?

A Sure.

Q And let me ask you this. If you say there was only a particular trapezius muscle sprain that you observed on that occasion I would be fair to conclude, wouldn't I, that it would be a highly particularized or localized type of sprain or in the alternative did it extend beyond that one trapezius muscle?

A It extended into the muscles that control the neck movement, consisting of spinal muscles, and the trapezius muscle on each side.

Q So the sprain was not in fact confined to the one of the group of the trapezius muscles about which you have just talked?

A Correct.

Q We have more than just the very localized spas

A Correct.

Q You answered that a voluntary contraction of the muscle couldn't be made where only one branch

MDpa 59 Burton-cross

of the trapezius muscle was involved, but we have now agreed that that was not the case, is that so?

A I have agreed the muscles in this gentleman, namely, the paraspinal muscles, were also spastic, and I can't contract those voluntarily no way.

Q May we go for a moment to the word spurring. Is there spurring disclosed in the x-rays we have in Court here, Plaintiff's Exhibit 24 for identification?

A Yes.

Q Of course, we don't have the other x-rays so a comparison cannot be made either between last week, January 20, 1975, and the date of the second accident, May 24, 1970, and the date of the first accident about which we are here in Court, November 8, 1968.

A I agree.

Q At any rate, as I understand it, doctor, it would be difficult for you to point out on these x-rays to the jury, the x-rays that you have here, that spurring?

A The spurring I could show, but as far as superimposition is concerned that takes about a 300 watt bulb. If you have got one I will show it to you, but it's very difficult to see except by extremely bright light.

Q Let's eliminate the superimposing and take the separate x-rays. If I am not incorrect, you had two

MDpa 60 Burton-cross

side views and one front view, didn't you?

A You are correct.

Q Can you show the spurring on the x-rays that you do have there, apart from the superimposing.

(Pause.)

A This is the cervical spine seen from the front, this being the skull up on the top, this being the rib cage and the collar bones down at the bottom. These are the roots of the lungs. These are the bones of the cervical spine. With this x-ray technique teeth are removed and the jaw is kept in motion so that the jaw is blurred out and you see the whole neck shining through very nicely.

On the left side in between the vertebrae one can now see spurs. These are little hooks of bone that ordinarily are not present, and they indicate, like barnicles on a ship, they indicate the fact that the joint surfaces are not absolutely congruant, they don't fit together perfectly, and they develop all sorts of hooks and rips that have normal strains and stresses.

These sharp points at each and every level are bone spurs. They can be seen as hooks coming out on each side, and they join one another very much like clappin hands. These are called kissing osteospines or kissing spu

because they occur opposite one another like a reaction point and an action point, and he's got spurs sticking out on both sides at the lower level, C-6-7, C-45, C, all the way up.

On the other side he has some slight spurring but much more substantial on the left side than on the right side, and these spurs on the frontal view occur at the place where the nerves come out. If the spurs are there then the nerve has less room to get out of the cervical spine, and thereby as the spurs get bigger the room available for the nerves to come out through that opening become accordingly less.

Q I don't mean to interrupt you, and please resume, but I would like to put a question there, if I might, just a moment. Relative to -- you mentioned the nerves in the hand and arm. Would they, what you were talking about in the hands and arms, be affected?

A Correct. The nerve supply to the upper extremities comes from C-5-6,7,8 and T-1 or D-1, which means it comes from the 5th, 6th and 7th cervical vertebrae and the thoracic or dorsal spine. This is the area we are talking about that sends the nerve supplies to the hands, shoulders and arms, very much like a telephone in a switchboard. The proper cable would go from the switchboard to the

telephone and it would ring. The cervical out-flow goes to the areas. C-6 goes to the thumb, C-5 goes to the shoulder and hand. 7 goes to the pinky and ring finger. C-8 goes to the inner part of the hand.

So this is the ballpark, and these are the nerves which are involved in the upper extremities, and the spurring can be seen very clearly on this view, much more pronounced on the left side than on the right side.

THE COURT: You referred to the fact people start getting osteoarthritis from the day of birth on.

THE WITNESS: Correct, sir.

THE COURT: How would you compare the degree of osteoarthritis reflected in these x-rays which I believe were taken in 1968 --

THE WITNESS: No, sir, these films were taken just last week. The other films I don't have. These show what I would estimate to be a significantly greater amount of osteoarthritis than I would ordinarily expect to find. It's not an absolute, but ordinarily I would expect to find less.

This is very substantial involvement.

THE COURT: With respect to the x-rays which you took in 1968 or 1969, how did the degree of osteoarthriti visualized in those x-rays compare with what would be normal

or average for a man of Mr. Batchkowski's age?

THE WITNESS: At that time they were about the same. I felt there was nothing unusual. That's why my prognosis at that time was a s favorable as it was, because the degree of osteoarthritis appeared to be significantly equal to that I would normally expect to find. This indicates the reason why he can't move his neck, because he has these spurs at each and every level and they block rotation. They are impediments to rotation and bending motion, and this adequately explains why he can't move his neck.

Q May I interrupt at this point in line with the question his Honor has put to you, this business of osteoarthritis commencing with birth, and then it progresses down to whatever point the individual may be of age at the time, that of course is a degenerative process, I take it. You as a medical man view it as degenerative, don't you?

A Well, there is only one way to stop it that I know of.

Q At any rate, are we saying that that is the way osteoarthritis developes and normally progresses?

A Well, you can't really call it normally progressive. We call it abnormally progressive. But it certainly is an acceleration of the degenerative process.

Q Do you subscribe to the theory that osteoarthritis comes from trauma?

A From strains and stresses to the neck, one of which can be in addition to the strains and stresses of ordinary living, an accident, injury or blow, some process which accelerates it. The strain and stress of ordinary living without question takes a toll on your joints and my joints.

Q So it's not the result of trauma?

A I didn't say that. I said it can accelerate to the degeneration if you add a good force. It's the push.

Q What you mean -- as a medical man, and I think you have already used the term, aggravation is what you used?

A Actually, aggravation isn't the proper word. The proper word should be activitation. In other words, to take a dormant sleeping dog and wake him up.

Q All right. I have interrupted you.

A This is a side view showing Mr. Batchkowsky's neck from the side, and here's some spurring which can be seen from the both sides. The other spurs we saw are covered up on the side here because they stick out this way. The nerves come out through the area in the back.

MDpa 65 Burton-cross

These are the difficult spaces, and there is only one space between C-5 and C-6 that shows a large hook spur and the one below it shows the same. The main thing on this view is the angle of curve. This is the maximum that he could bend his neck in the forward position, and we took the other x-ray in the backward position and the curve measured out in my office exactly the same, which meant that this was a rigid tube of vertebrae that didn't move when he bent his head forward and bent his head back the way yours and mine would move. This again is x-ray evidence without question of rigidity of his neck. It just doesn't move.

Q When you used the term during your direct examination of nerve pinching, I believe those were the two words you used.

A It's a so-called pinched nerve.

Q I understand. The pinch occurs with this spurring as C-5, 6 and 7 nerves come out.

A Exactly.

MR. GAUS: I have no further questions.

Oh, if I may, I did have another thought. If you will bear with me for just a moment until I put it together. I just want to clear up a point, and that is from your testimony one would expect the arthritis and the

spurring that you have told us about through the living process, as I understand it -- correct me if I am wrong -- so that the normal activities, and maybe of some stress, additional stresses that are put on the human body that might, you said I think accelerate the osteoarthritic changes, is that correct?

A Yes.

Q From that I am fair to conclude, am I not, that a normal active individual or an individual engaging in an acitve vocation would be subject to, according to your indications, would be a greater subject of the osteoarthritis than a sedentary individual?

A That is usually true.

Q Are you being paid for your time here, doctor?

A I hope so.

MR. GAUS: I have no further questions.

THE COURT: Any redirect?

MR. JURON: Yes, one or two questions.

REDIRECT EXAMINATION

BY MR. JURON:

Q Doctor, Mr. Herbert asked you some questions about whether Mr. Batchkowsky at the present time could do the work of a car marker or flagman, and he very briefly

described to you that a car marker is a man who marks cars and a flagman is a man who waves a flag.

Now, if I were toput it to you that a car marker and flagman works in a freight yard where there are moving trains as well as other moving vehicles, and that as a working man in such a place with moving trains and moving vehicles he is required to constantly look back and forth, front and back, side to side, for oncoming vehicles and oncoming trains, would your opinion that he could do such a job be the same as when Mr. Herbert put it to you as merely that of a man who marks a car?

MR. HERBERT: I object to the form of the question. It incorporates much more than I think was testified to in this case, your Honor.

THE COURT: I am going to sustain it.

Q I will put it to you this way, in a hypothetical question, if I may. Assuming, if you would, that a car marker works in a freight yard where there are moving trains and moving vehicles, and that he's required tomove his head about to watch for oncoming vehicles and other moving vehicles, would you say that Mr. Batchkowsky at the present time could hold such a job?

A I believe he wouldn't be able to do that sort of work.

Q Would the same answer be given if I were to suggest to you that a flagman also, and most especially a flagman, is required to watch for oncoming vehicles, oncoming trains from all directions?

MR. HERBERT: I object to that. That is not what the testimony was. A flagman is testified to as just protecting the rear of his own train.

THE COURT: Sustained.

Q I am suggesting to you that a flagman is required, if you would take this, to protect the rear of a train which requires him to be at all times extremely vigilant and observant. Would you say that Mr. Batchkowsky could fulfill such job?

MR. HERBERT: Objection to the form of that question, your Honor.

THE COURT: Sustained.

Q I would suggest to you --

THE COURT: As the duties of a flagman have been thus far described in the record, he protects the rear of his own train. If his train stops, he gets out of the caboose where he is normally stationed, walks back down the track, and puts up a flare or waves a flag to stop oncoming trains to prevent them from running into the rear of his train. There are not trains coming from all

directions. Trains normally run down the track.

MR. JURON: Up the track, come around switches, go back and forward. They go generally in all directions of the compass. I would ask the Court to take judicial notice of the fact that there are different forms of tracks.

MR. CAUS: May I raise objection to counsel testifying and ask the Court if he wants to testify we be given the right to cross examine him.

MR. JURON: After lunch.

THE COURT: I am going to ask the jury to disregard the remarks of the Court and Mr. Juron as well. Those remarks are not evidence. I have sustained the objection.

MR. JURON: Thank you very much.

No further questions.

RECROSS EXAMINATION

BY MR. HERBERT:

Q I have a few questions.

Doctor, you spoke of x-rays that you took in 1968 and 1969. Is that the complete file of Mike Batchkowsky that you have in your office?

A It's the only one that I could find.

Q Do you have any letter indicating in fact you

MDpa 70 Burton-recross

did send letters to Dr. Balensweig?

A Actually, we do.

Q Did you bring it to Court with you today?

A No. We have a ledger book and when an x-ray is taken it's listed in the book. If a film leaves the office there is a place called in and out. Next to Mr. Batchkowsky there is a check in the out column and no check in the in column. But it's a big ledger book, it's 15, 16 years old now.

Q That is the record you have of Dr. Balensweig having the x-rays?

A That's correct.

Q Do you know whether or not Dr. Balensweig received those x-rays?

A It's simple to call him.

Q I have called him during the trial and he says --

MR. JURON: Objection, your Honor. Do you want to cross examine him, too?

THE COURT: There is a little argumentation on both sides.

A I really don't know, sir. They were sent out from my office. Whether he actually physically got them I couldn't say. I don't know.

RECROSS EXAMINATION BY

MR. GAUS:

Q The date of your most recent x-rays, the ones that are in Court, are January 20th, last week?

A Correct, sir.

Q We are a week and some couple of days beyond that point. Did you in fact call Dr. Balensweig and ask a return of those x-rays?

A I didn't.

Q So we have nothing to compare the x-rays that you brought to Court with.

A Sir, we tried yesterday to reach Dr. Balensweig's office just on this particular point, and we were unable to get through. The secretary wouldn't talk to us, wouldn't give us any information with respect to the x-rays.

Q But the trial had already commenced, whereas last week you took x-rays before the commencement of the trial.

MR. JURON: Objection, your Honor. I would object to this. He is the one who complained about me.

THE COURT: I sustain the objection.

MR. JURON: Your Honor, a subpoena was served upon Dr. Balensweig's office last night. When we first became aware of the apparent location, and the records

are not in Court, but the subpoena was served on Dr. Balensweig's office after I had the conversation with Dr. Burton.

THE COURT: All right. If Dr. Balensweig has them presumably he will bring them.

Q Doctor, at any rate, regardless of where the other x-rays were, as of January 20th, when you took these most recent x-rays, I take it that you took these in anticipation of coming to Court, is that not a fact?

A Yes, sir.

Q And you anticipated giving some prognosis, and telling the Court and jury the relative progression of whatever had occurred from the time the accident down to the present, is that not a fact?

MR. JURON: If your Honor please, I think this is improper recross. I don't believe that my redirect encompassed the items that Mr. Gaus is now getting into.

THE COURT: I will permit it.

MR. JURON: Thank you, sir.

THE WITNESS: Yes, sir, this is what I have been doing all along. I have been rendering a prognosis in 1969, modifying it in 1970, changing it as the patient's condition changed all along.

Q Right. But we are left without one very vital

element and that is the other x-rays, are we not?

A Well, I don't know how vital --

Q From which to draw the comparison about which you are testifying, are we not?

MR. JURON: Objection, your Honor. I object to the use of the word "we".

Those records were known and were available to Dr. Burton when he made his original diagnosis and original prognosis, so when Mr. Gaus says we I assume that he excludes Dr. Burton.

MR. GAUS: Again I am going to object to this gratuitous statement of counsel.

THE COURT: I will instruct the jury to ignore all the statements of counsel. Rephrase your question.

Q In drawing a prognosis, doctor, as you have done here, you have traced a cervical sprain to a point where you say there is a consequence of limitation of motion, of pain and other things, and I assume initially that you took the x-rays with a certain purpose in mind, is that correct?

A Yes.

Q A part of that purpose, I suggest, was diagnosis, was it not?

A Diagnosis for the purpose of treatment.

Q You have taken the latest x-rays here, January 20th, for what purpose?

A The purpose was to compare them with my original findings which I did since I have a very literate and complete x-ray report which I dictated myself when I had my original x-rays in my hands. I can then use that report as my sum total of the knowledge of the information gained from those films. So this is not just a question of comparing apples with oranges. I am comparing it with the findings made by me in great detail in 1969.

Q Would you say that your notes would be of greater value than the x-rays themselves?

A No, sir, but I am saying that --

Q Right, you don't --

A I would interpret my x-rays, dictate my findings with my films in my hand so this is an extension of my memory.

Q But you would agree that the best evidence of spurring and the conditions about which you spoke were the x-rays themselves?

A I couldn't agree with you more.

Q Right.

A But nonetheless this is the only substitute

available to me at this time and it's a quite satisfactory one.

Q You say it's the only substitute. As I understand it you did not make a call on January 20th to Dr. Balensweig. Is that correct?

A As you understand it, that's correct. However, I did make a call to his office yesterday.

Q And doctor, you said something about notes of x-rays. Have we had the opportunity to see those?

A You have had my record for at least 15 minutes.

MR. GAUS: I have no further questions.

May I just take a moment with those x-ray notes. I don't think there is going to be much more.

THE COURT: All right.

(Pause.)

Q There are some terms in there I am not sure of, but you have used the term spurring in your testimony. Does the word spurring appear?

A No. The spurring is new.

MR. GAUS: I have no further questions.

THE COURT: Thank you.

(Witness excused.)

THE COURT: We'll take our noon recess now,

didn't you?

A Yes, sir.

Q Basically, and disregarding the word whiplash, but under the old terminology was there a whiplash and a cervical sprain could be used sometimes interchangeably, will you agree to that extent?

A Yes.

Q And this type of injury, where a cervical spine -- and just to define terms further, cervical spine as used it means the neck, is that not correct?

A Right.

Q So that cervical sprains are items, are they not, items of injury, whether called by any other name, that are susceptible of occuring absent even an impact to the head, will you agree with that?

A Yes.

Q So that if a person sits in a car or an automobile or a vehicle that comes into violent collision with another, he can suffer a cervical sprain without hitting his head on a rail, without coming into contact. I think you have just agreed with your last answer, is that not so?

A Yes.

Q Cervical sprains -- I don't know if we have

and we'll come back at 2:00.

MR. GAUS: Before the jury goes out, may I ask one more question since I assume the doctor will be gone after lunch?

BY MR. GAUS:

Q Is there a term synonomous with spurring that is used in that report?

A No, sir.

Q Was there an osteoarthritic condition disclosed by those original x-rays as shown by that report?

THE COURT: He has already said that.

Q I am talking about in his notes. He has testified to that, but I don't know that he said it was in his notes.

A Yes, sir.

MR. GAUS: All right. I am finished.

(Jury excused.)

THE COURT: I take it that plaintiff rests.

MR. JURON: With the exception of some payroll information that I will stipulate with Mr. Herbert possibly this afternoon, your Honor.

THE COURT: All right.

MR. HERBERT: As well as the periods of

* * *

MDpa 87

MR. JURON: Thank you.

(Third Party Defendant Anheuser-Busch Exhibit E received in evidence.)

THE COURT: You are still free to put in any evidence you want to dispute it, and you can still argue that it's not relevant. At this point I just don't want to keep it out because I am not sure 100 percent it isn't relevant.

MR. GAUS: Here's the supplemental agreement we referred to, and which is the basis of the third party action, and I assume he is going to put it in, but he tells me he doesn't have the complete supplemental agreement which has attached to it the document, so this is the supplemental agreement.

THE COURT: We'll receive the copy that has the document.

MR. HERBERT: I have no objection to it.

MR. JURON: It's already in.

THE COURT: He is talking about the one with the blueprint attached.

MR. GAUS: Plus as I mentioned to your Honor the 1956 addition, which is the extension out, and that is this part. It's the same specifications in B-9, so this entire thing belongs together.

MDpa 98

THE COURT: All right. I take it there is no objection to that, either.

MR. HERBERT: I haven't seen it before. I will reserve my exception on relevance in such time as I have had an opportunity to look at it.

(Third Party Defendant Exhibit F received in evidence.)

(In open court, jury present.)

MR. GAUS: Now, if your Honor please, I am going to discharge my witness.

THE COURT: Is your witness here, Mr. Herbert?

MR. HERBERT: No, your Honor.

THE COURT: I understand you have some material to read.

MR. HERBERT: Yes, your Honor.

At this time the defendant would like to read into evidence from Exhibit A, the answers made to the interrogatories by Mr. Batchkowsky in the lawsuit against the Public Service Coordinated Transport and Holland McLooney.

I would like to read question one, which reads, "Were you involved in a collision involving --"

MR. JURON: May I look over Mr. Herbert's shoulder because there might be additional material for me

MDpa 80

to read.

THE COURT: All right.

MR. HERBERT: Question one:

"Were you involved in a collision involving a vehicle driven by Holland McLooney on or about May 24,1970, at the Port Authority Bus Terminal, New York City, New York?

Answer: "Yes."

Question two: "If so, state your, A, full name."

Answer: "Mike Batchkowsky.

"B: Date and place of birth."

Answer: "March 2, 1915."

"C: Home address."

"120 Oxford Street, Brooklyn, New York."

"D: Business address."

Answer: "Penn Central Railroad, Waverly Yard, Waverly, New Jersey."

"E: Occupation."

Answer: "Brakeman and car marker."

"F: Height and weight."

Answer: "Height 6'3", weight 230."

"G: Color of hair and eyes."

Answer: "Hair brown, eyes brown."

MR. HERBERT: I would like to read from

MDpa 90

interrogatory number 73, your Honor. 73 asks:

"To the best of your knowledge, or that of your attorney, has any doctor advised you or your attorney as to the prognosis of any of your injuries?"

And the answer to that was:

"Yes."

Question 74: "If so, state, A, which injuries you have been advised are probably temporary, B, which injuries you have been advised are probably permanent and C, the name and address of the doctor so advising."

Answer: "The injury to my mouth, jaw, gums and tongue, and the sequela thereof will be permanent. The injuries to my right wrist, hand, and forearm, and the sequela therefore will be permanent."

Interrogatory number 120 asks:

"Do your injuries make it difficult or prevent the performance of your work or occupation?"

The answer given was: "Yes."

Interrogatory 126 asks: "If so, in what manner has your work or occupation been made more difficult or impossible of performance?"

Answer: "I am unable to grasp onto or hold on the ladder handholds or grasp onto the side of freight

MDpa 91

equipment because of the weakness in my right wrist and right arm, and must only pick car marking jobs. I am unable to work as a freight conductor or brakeman due to this condition in my right hand, arm, and wrist."

127 asks: "As a result of this accident, have your duties had to be lightened?"

Answer: "Yes."

Interrogatory number 128 asks: "If so, state A, the nature and degree of the reduction in duties."

Answer: "I work as a car marker."

THE COURT: What's the date of those answers?

MR. HERBERT: The answers were verified on December 15, 1970.

I am sorry, that is the affidavit of mailing.

On the 28th day of April, 1971.

Interrogatory 131 asks: "Will you lose any earnings in the future as a result of this accident?"

Answer: "Yes."

THE COURT: What does this accident refer to in the last interrogatory?

MR. HERBERT: This accident refers to the bus accident, your Honor.

MDpa 92

Interrogatory number 132, which followed that last one was, "If so, state the amount of the potential loss of earnings and B, the manner in which you computed this amount," and the answer was, "I am working at reduced earnings of $2.36 per day because of my inability to do freight conductor's work due to the weakness in my right hand and wrist, and B was car marker's rate per diem, $33.36, freight conductor's per diem$36.12.

I would like to read, your Honor, a portion from Exhibit C in evidence, which is the statement of James F. O'Kane, which is in evidence, where Mr. O'Kane states, "Coming off B-8 Batchkowsky and I saw the handles protruding from the cars and he nodded acknowledgement and tried to close the handles of the cars but they were still protruding as we moved into B-8."

The side track agreement has already been offered in evidence a moment ago, your Honor. I would like at this time to read portions of the testimony given by Mr. Batchkowsky in an examination before trial which was held on January 15, 1975, and which Mr. Juror has conceded it's a verified executed deposition.

THE COURT: Will this be extensive?

MR. HERBERT: No.

THE COUPT: I was going to say if it is it's

MDpa 93

sometimes clearer to have my law clerk read the answers while you read the questions.

MR. HERBERT: I will be moving from page to page, your Honor. I will do it that way if you would like me to.

THE COURT: If it's not going to be extensive, no.

MR. GAUS: Since I have a copy we can do it together, and I will be marking my copy accordingly.

THE COURT: If that is agreeable, Mr. Herbert.

MR. HERBERT: That is satisfactory.

These were questions which were asked of Mr. Batchkowsky in January of this year.

THE COURT: I might tell the jury that this is an out of court deposition -- that is, it's a testimony session at which the witness, in this case Mr. Batchkowsky, is sworn just as he would be sworn in court, he is asked questions by counsel, and he answered, and a court reporter takes down the questions and answers, and then after the deposition testimony has been transcribed, it's then signed by the witness.

It has the same effect as testimony taken in open court.

MR. HERBERT: Mr. Gaus, page 7, line 12.

MDpa 94 "Batchkowsky"

"Q Did the accident occur as the train was going into the industrial plant or as it was coming out?

"A As it was going into the plant.

"Q And where was it coming from?

"A From out in the yard.

"Q And when you say out in the yard would you tell us --

"A The Budweiser yard, the Anheuser-Busch yards."

MR. HERBERT: Page 23, please, line 22.

"Q Would you describe, please, specifically where you were at the time of the accident?

"A I was just inside the plant.

"Q When you say just inside the plant, can you give us some specific references to where you were with relation to the entrance, and so forth?

"A I was about 10 foot inside the building, inside the plant, and I was standing adjacent to Track B-9."

Page 25, Mr. Gaus, line 18, through line 20.

"Q Where in relation to the door and staircase did this accident happen? Where were you?

"A Right near the door, about 10 foot away, inside the plant."

Page 28, please.

MR. JURAN: For the interest of brevity,

MDpa 95 "Batchkowsky"

would you read the next question, Mr. Herbert, and answer?

MR. HERBERT: I think that we were speaking -- if you will read the next several questions you will see it's not relevant, Mr. Juron.

THE COURT: Read ahead, Mr. Juron, a little bit and see if you want to reconsider that request.

MR. HERBERT: I think there was some confusion on the part of the witness.

MR. JURON: You may be right. We will skip on.

MR. HERBERT: Page 28.

MR. GAUS. May I have the right to read questions which are omitted?

THE COURT: You may.

MR. HERBERT: Page 28, line 11.

"Q And from the time you had entered the plant, as you walked in, at any time from that point until the time of this accident, had you turned your face or looked in the direction of the engineer?

"A Well, I am watching the conductor and every once in a while I look back to see if the engineer is on my side because there is a little curve out there.

"Q Had you done that on this occasion before this accident?

MDpa 36 "Batchkowsky"

"A Yes, sir. You have to do it.

"Q So at some point you looked back at the engineer?

"A Right.

"Q Was this in the process of conveying some signal between the conductor and the engineer that you had this accident?

"A Yes, sir.

"Q And you were inside the plant at the time you did this, I take it, is that correct?

"A Right. That's correct.

"Q Did you have an unobstructed view of the engineer so that you could convey the signals to the engineer at that time?"

These questions were being asked by Mr. Caus, and I asked him to, if he was referring to at the time of the accident, and he said yes, at the time he was talking about in his last answer and the witness answers that question as follows:

"A Well, when he was coming in he was at the curve, see. So I had to step out to the side, give him a signal, 'Go ahead', then when he comes in the track more or less straightens out and then he starts coming into view, see?

MDpa 97 "Batchkowsky"

"Q I just want to go back two questions to where you said that you conveyed a signal from the conductor to the engineer. In order to convey a signal to the engineer you had to see him, is that correct?

"A I had to see both of them, yes.

"Q And then you did convey a signal after you went inside the building?

"A Right.

"Q Inside the plant?

"A Right.

"Q And having conveyed a signal you would have had to have been in visual contact with the engineer to convey this signal, is that right?

"A Right. That's correct.

"Q And it was after you conveyed this signal to the engineer that your accident happened, is that right?

"A That's correct."

MR. HERBERT: Page 42, line 12.

"Q How close to the side of the car were you standing at the time of your accident?

"A Right next to it.

"Q When you say right next to it, give us the closest point of your body to the edge or side of the car.

"A About a foot.

"Q How would you describe the contact at the time of the first handle with your back, was it light, medium, heavy or what?

"A I didn't even feel it.

"Q And the second contact?

"A I didn't feel that, either."

Page 71, line 20.This is now questions by Mr. Herbert.

"Q The car that was involved in this accident, was that picked up at the Anheuser-Busch plant?

A Yes, sir."

That completes my reading of the testimony, your Honor.

THE COURT: Are there any additional portions that either counsel wish to read?

MR. JURON: Yes, I would like to.

MR. GAUS: I will be happy to volunteer to serve, Mr. Juron, if it helps.

MR. JURON: I don't think I need that much service. I can fend for myself, thank you. Just very briefly.

MR. GAUS: No charge.

MR. JURON: Thank you.

MDpa 99 "Batchkowsky"

MR. JURON: Going back, if I may, in reverse, to the deposition, page 42, may I first reread a certain portion that was just read by Mr. Herbert and Mr. Gaus, page 42, line 15. Question, line 12.

"Q How close to the side of the car were you standing at the time of your accident?

"A Right next to it.

"Q When you say right next to it, give us the closest point of your body to the edge or side of the car.

"A About a foot.

"Q How would you describe the contact at the time of the first handle with your back, was it light, medium, heavy or what?

"A I didn't even feel it.

"Q And the second contact?

"A I didn't feel it, either."

If I may add the following, the next question:

"Q With your head, were you conscious at each of the contacts?

"A Yes, all those -- I didn't remember anything and I was all bloody. That's all I remember."

MR. GAUS: As witness makes last answer he passes left hand over his face.

"Q Am I describing it correctly when you say you

were bloody all over at the time, which contact was that, or was it after?

"A When the handle hit me in the head.

"Q I am not sure I got an answer to the question as to whether or not you were conscious or aware at the time the second handle came in contact with you?

"A No, I wasn't.

"Q And do you know if you fell to the ground or siding immediately following your accident?

"A Yeah, I fell down and I rolled.

"Q What happened thereafter?

"A Well, they come running over to -- the engineer, then the conductor, then the platform man, he was right there.

"Q Did you go to the hospital or did you receive any medical treatment?

"A They wanted to take me upstairs but --

"Q I didn't ask you what they wanted to do; did you receive any medical treatment or did you go to the hospital?

"A I went to the hospital."

Mr. Herbert read a portion of Exhibit C. May I read the entire statement, please? This is the statement of James F. O'Kane, who was the engine man.

Is that right, Mr. Herbert?

MR. GAUS: The engineer.

MR. JURON: Engineer. This is a statement dated March 25, 1969. If I may skip over the identification and get right into the heart of it.

(Mr. Juron read from Defendant Anheuser-Busch Exhibit C in evidence.)

MR. JURON: May I read from the introduction? And these are plaintiff's answers to defendant's interrogatories of the case of Mike Batchkowsky against the Public Service Coordinated Transport, and Holland Mc Looney, defendants.

THE COURT: Unless these relate to the precise introduction read by the defendant they are not admissible on behalf of the plaintiff.

MR. JURON: I am aware of that, sir.

MR. HERBERT: I will object that they are not relevant, your Honor, the proposed interrogatory number. Maybe we better get a ruling on it.

THE COURT: May I see it, please, the interrogatory and the answer.

(Handed to the Court.)

MR. JURON: Does the Court wish to hear argument on that?

MDpa 102 "Batchkowsky"

THE COURT: It seems to me, Mr.Herbert, that this relates fairly closely to the interrogatories and answers which you read with respect to permanent disability as a result of the 1970 accident.

MR. HERBERT: I was reading what he claimed to be the injuries which were permanently disabling, yes, your Honor. This question does not relate to that. They relate to other injuries which are not of any moment in this lawsuit.

MR. JURON: Your Honor, Mr. Herbert read what were claimed to be permanent injuries of the bus accident. These are specific claims made by Mr. Batchkowsky in that accident as to the specific parts of his anatomy which were affected. Since it opened the door with respect to the claim of permanency in the subsequent accident I think we should be permitted to read exactly what Mr. Batchkowsky said was affected in that accident, the parts of his body.

THE COURT: I think it's admissible. 78 and 79. I don't know that you really need 79.

MR. JURON: I didn't ask for 79, your Honor.

79, question 79, we are dealing with the bus accident of May, 1970, is that correct?

MR. HERBERT: Yes.

MR. JURON: We are concerned with the

accident of May 1970 involving the bus, and once more if I may repeat, these are answers dated April 28, 1971, approximately 11 months after the bus accident. Is that correct, Mr. Herbert, will you so stipulate?

MR. HERBERT: Yes.

MR. JURON: These are questions put by the defendant to Mr. Batchkowsky in that case.

79:

"With respect to the injuries you received as a result of the accident herein, state the nature, extent and location of A, any cuts or lacerations, B, any fractures or dislocations, C, any bruise or other visible injuries, D, any pain experienced during the 24 hours subsequent to the accident, E, any pain experienced during the week following the accident, F, any pain presently being experienced."

The answer given by Mr. Batchkowsky in that case is:

"Medical reports and records annexed.

I still experience pain in my mouth, jaw, gums, tongue, and wrist, and occasional pain in the knee."

MR. JURON: Question 144:

"Prior to this accident did you ever sustain any other injury?"

The answer is: "Yes."

149: "If so, state, A, the nature of the injury, B, the date of the injury, C, the circumstances of the injury, and D, whether the condition existed in any form at the time of the accident."

THE COURT: You are not objecting to this I take it, Mr. Herbert?

MR. HERBERT: No, though I don't think it rebutts what I had to say before. We have testimony from the doctor on this injury.

MR. JURON: I think it would distinguish.

MR. HERBERT: I will just object on relevance.

THE COURT: I will sustain the objection. You cannot use the plaintiff's answers to interrogatories unless they explain the answers which Mr. Herbert has read, and this does not because he read portions relating to the 1970 accident, and nothing relating to the 1968 accident.

MR. JURON: All right, your Honor.

MR. HERBERT: Mr. Juron, are you prepared to stipulate with me with respect to the earnings of Mr. Batchkowsky and the rates of pay in effect at the time?

MR. JURON: Mr. Herbert has given me a schedule of earnings of Batchkowsky for 1967 to 1975, 1973,

1974 and 1975, show nothing. The raise of pay, which I have no reason to doubt, and the defendant's records showing the period of time that he was absent up until May of 1972, and his testimony was that following May of 1972 he did not work at all, and I have no reason to doubt Mr. Herbert. I would merely point out to him that the period May 25, 1970 to August 27, 1970, was a period when he was disabled because of the intervening bus accident, so that would be excluded.

MR. HERBERT: I understand that, but that would show the periods of absence without regard to the reasons.

MR.JURON: I am prepared to stipulate to this, but the actual mathematics I will have to thrash out with Mr. Herbert later this afternoon.

We'll offer both documents.

(Plaintiff's Exhibits 25 and 26 marked for identification.)

MR. JURON: I offer them in evidence.

MR. HERBERT: No objection.

(Plaintiff's Exhibits 25 and 26 received in evidence.)

MR. HERBERT: We have offered in evidence and there has been received the supplemental side track

* * *

MDpa 110 "Batchkowsky'

"Q Correct me if I am wrong, had you not testified that the unit came from the yard, that these five cars and the engine had come from the yard outside, is that what you said before?

"A A couple of cars we got from the yard and a couple of cars we got from the siding.

"Q Let's go back to cover the situation as to what came from the yard. How many were put together or coupled or whatever was done to the engine in the yard?

"A I don't know how many cars. I know we got a couple of cars from the yard and a couple of cars from the siding, the exact number I don't know, I forget.

"Q The cars you had gotten from the yard you say a couple and you don't know the number?

"A No."

Page 25, line 10.

"Q Now, would you describe the area generally in which your accident happened?

"A Well, when you go in there there is a door that opens and closes. You have got a space there with a staircase on the side and then comes the platform itself."

Incidentally, this next question and answer were readby Mr. Herbert;to continue the sequence with your permission I will reread it.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

MDpa 111 "Batchkowsky"

"Q Where in relation to the door and staircase did the accident happen? Where were you?

"A Right near the door about 10 foot away inside the plant.

"Q Was the door fully opened at the time of the accident?

"A No.

"Q Describe how the doorwas at that time.

"A To me it looked like it was closed.

"Q I am talking about the door of the plant.

"A The door of the plant was open, yes."

Page 30, line 15:

"Q Were there any of the cars in the five-car unit inside the plant at the time you conveyed the signal to the engineer about which we are talking about?

"A Yes, sir."

May I interpellate that the signal was -- the questions relating to the signal were in questions that had been read by Mr. Herbert and there are several. I see no need to repeat them.

THE COURT: All right.

MR. GAUS: Answer: "Yes, sir."

"Q How many cars were in at that point?

"A About two or three.

* * *

MDpa 114 Balensweig-direct

H O W A R D B A L E N S W E I G , called as a witness by the defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HERBERT:

Q Are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q When were you so licensed?

A 1949.

Q Will you tell the Court and jury what your background is, your medical training has been, what degrees you hold, what hospitals you are associated with, and in general what your specialty might be, if any.

A Yes. I graduated from Cornell Medical School in 1946, was a resident at Hospital for Joint Diseases in orthopedics in 1949 to 1952. Since 1953 I have been practicing orthopedics in New York City in partnership with my father, who has been an orthopedist since 1920, and I am presently assistant attending surgeon at New York Hospital, assistant attending surgeon at the Hospital for Special Surgery, and I have been diplomate of the American Board of Orthopedic Surgery since about 1955.

Q When you say diplomate, what does that mean,

doctor?

A Ths means I have fulfilled all the qualifications to become a certified orthopedic surgeon, including a year of internship, three years of residency, two years of practice, and taking two examinations each of two days duration.

Q Will you tell us what orthopedics deals with?

A The diagnosis and treatment of diseases and injuries to your muscular skeletal system which means your bones, joints, and anything that affects them.

Q At the request of the railroad, were you called upon in 1969 to evaluate the condition of Michael Batchkowsky?

A Yes, I was.

Q Did you as a result of that request examine Michael Batchkowsky?

A Yes, I did.

Q In fact, in the past you have been called upon on many occasions to evaluate the physical condition of railroad employees at the request of the railroad?

A Yes, I have.

Q Have you from time to time been required or requested by the railroad to come in Court to tell the jury what your evaluation has been and what your findings

MDpa 116 Balensweig-direct

may have been in connection with a particular injury?

A Yes, I have.

Q You did examine Mr. Batchkowsky back in March of 1969, is that correct?

A Yes.

Q You obtained from him a history of having been involved in an accident on the railroad at the Anheuser-Busch plant when he was switching cars?

A I didn't know where it was but I know that he was involved in an accident.

Q What did he tell you with respect to what happened to him?

A He told me that he was standing alongside a moving train directing its movements, and as he faced forward a door opened and one handle hit him in his back, spun him around, and another handle hit him over his right forehead andknocked him to the ground.

Q You did thereafter conduct an orthopedic examination of Mr. Batchkowsky?

A I did.

Q Would that include the parts -- what parts of his body did that examination include?

A Head, neck, chest, arms and trunk.

Q Without going into the specifics of the

MDpa 117 Balensweig-direct

examination, doctor, since I know the hour is getting a little late, and there are two other counsel who I am sure will deal with this, let me just ask you whether in addition to conducting a physical examination you took x-rays of Mr. Batchkowsky?

A Yes, I did.

Q What parts of the body did you x-ray?

A I x-rayed his neck and his rib cage and shoulders.

Q What did the x-rays of his neck disclose?

A They disclosed arthritic changes with some narrowing of intervertebral foramina on the left side, C-34, 45 and 56. They showed some arthritic spurring. No narrowing of a disk, no fracture, and they showed a large calcification of the ligamentum nuchae, which are ligaments which run from the back of your head to the top of your upper back, and they showed a possible fractured right 7th and 9th rib.

Q Were you able to determine at all from your x-rays whether there was in fact a fracture of the ribs?

A No, I wasn't the least bit concerned. I saw him four months later, and I couldn't see any definite fractures, but I couldn't deny that he might have had fractur

MDpa 118 Balensweig-direct

Q Were you aware of the fact when you conducted your examination that he had been examined by a Dr. Murray Burton?

A Yes, I was.

Q Were you aware of the fact that Dr. Murray Burton had taken x-rays with respect to his ribs?

A Yes, sir.

Q In connection with the examination which you conducted you did submit a report to the railroad concerning your findings, is that correct?

A That's correct.

Q And did you also ask to see the x-rays that were taken by Dr. Murray Burton with respect to his rib fracture?

A I did.

Q And did you ever receive from Dr. Murray Burton any x-rays?

A No, sir.

Q As a result of your examination of Mr. Batchkowsky in March of 1969, and the x-rays which you took, as a result of that examination what was your diagnosis as to the nature and extent of the injuries received by Mr. Batchkowsky in this accident?

A First, he had an inch laceration over his fore-

head which had turned into a scar when I saw him.

Secondly, he probably had a fracture to the right 9th rib and may have had a fracture of the 8th rib. Dr. Burton, I believe, reported a fracture of the 9th and 10th ribs.

And he had a bursitis of both shoulders. I thought that he had some clinical evidence of a sprain of the left acromio-clavicular joint, which is the small joint at the top of your shoulder, and he had some findings of a sprain of his neck with an arthritic neck, and the arthritic neck pre-existed the accident, and I felt that the bursitis probably pre-existed the accident. It was in the right shoulder worse than the left and he had no complaints relative to the right shoulder.

Q What was your prognosis with respect to whether Mr. Batchkowsky would be able to return to work and if so when?

A I felt he could return to work within a month from the time I saw him, and that he would end up without any related problems.

Q What was your prognosis with respect to any permanency as a result of this injury?

A I didn't anticipate any when I saw him.

Q Did you recently see Mr. Batchkowsky within

MDpa 120 Balensweig-direct

the last week or so?

A Yes, I did.

Q Did you conduct an examination of Mr. Batchkowsky?

A I did.

Q What were your findings with respect to that examination, doctor?

A He had no significant complaints relative to his ribs. I didn't x-ray his ribs this time. He told me that on occasion when he made a sudden twist he felt a twinge in his right rib cage.

As far as his shoulders are concerned he didn't have any complaints. His shoulders moved well enough. His main problem was his neck, where he showed clinically some increase in arthritic changes. He had more limitation on rotation, and he on this occasion showed some reflex changes that make me feel that he could have a cervical ridge, which means an arthritic bump on the back of the vertebra which is causing some increased reflex changes, and additionally he had a mass in his abdomen and appeared somewhat jaundiced and I advised him to see a medical man about that.

Q That is not related to this suit?

A It's not related to this accident.

MDpa 121 Balensweig-direct

Q With respect to Mr. Batchkowsky's fitness for work, do you have an opinion as to whether Mr. Batchkowsky was at the time you last saw him able to perform the duties of a freight brakeman?

A I did.

Q And what was that, doctor?

A That he wasn't fit for work as a freight brakeman.

Q Would that be the type of work of climbing up and down cars and throwing handbrakes on and scrambling on and off moving cars?

A Yes, sir.

Q Mr. Batchkowsky told us among the duties of a freight brakeman include jobs such as working as a flagman where he is required to sit in a caboose and get out of it when the train stops, get out on the track behind his car, and flag any oncoming train on the same track. In your opinion, is Mr. Batchkowsky able to perform that type of work?

A Yes, he is.

Q Mr. Batchkowsky has also told us that he is required to perform the job -- that brakemen also perform jobs known as car markers. He told us that a car marker takes a piece of chalk and he has a cutting list of cars

MDpa 122 Balensweig-direct

in his hands and he goes up and chalks each car. According to the destination to which it's intended to go. This is performed in the yard. Is Mr. Batchkowsky in your opinion able to perform that type of work?

A Yes, he is.

Q Is Mr. Batchkowsky in your opinion able to perform the work of a freight brakeman -- of a passenger brakeman or a passenger conductor?

A He is able to perform the work of a passenger conductor. I don't know what a passenger brakeman does.

Q We have had no testimony on that, doctor, so I can't very well suggest to you what it might be.

A All right.

Q Doctor, did Mr. Batchkowsky when you last saw him give you any history of any intervening accident between the accident of November 1968 and January of this year?

A No, he did not.

Q Doctor, Mr. Batchkowsky has told us that in May of 1970 that he was a passenger in a public transport bus, and that the bus in which he was a passenger and in which he was seated collided with a standing bus as a result of which the standing bus was knocked 15 feet forward and Mr. Batchkowsky was propelled forward in his chair with

such force that he struck his mouth against the railing of the car ahead -- of the seat ahead and he fell from that position to the floor of the car. What relationship, if any, would that type of accident have to Mr. Batchkowsky's present condition as you saw him last?

A It could have a definite relationship. That represents what's called a whiplash mechanism of injury to the neck, the head being thrown far forward, and since his problem keeping him from working at his former job is in his neck it could have affected him adversely. I would have to see some medical records to determine if it did.

MR. HERBERT: I believe I will leave further questions to counsel for the other parties.

Thank you, Doctor.

CROSS EXAMINATION

BY MR. JURON:

Q Doctor, if I was caused to throw my head forward and strike this table without having my neck thrown back, would that be a whiplash mechanism?

A It still is.

Q Just forward?

A Just forward.

Q And if something came in contact with my face,

would that be a whiplash injury?

A That is an additional injury.

Q If something came in contact with my face would that be a whiplash injury?

A You mean stopping it from moving?

Q Something struck me in the face.

A If something struck you in the face and threw your head backward that is still a whiplash mechanism.

Q Wouldn't it be necessary in a whiplash injury for the neck to be thrown back?

A No.

Q Not necessarily?

A All whiplash means is sudden change in direction, and it doesn't mean necessarily it has to go back and forth. You can get the -- in fact, the fractures that occur in the neck from a whiplash mechanism occur with the head going forward, not with the head going back.

Q Wouldn't that necessarily involve the body being rigid and the head being thrown forward?

A Any time that you are in an accident with sudden deceleration the head flies forward first.

Q What happens if the whole body and head went forward at the same time? What happens if a man was thrown

MDpa 125 Balensweig-direct

out of his seat? Would it follow he would have a whiplash injury?

A If he were thrown out of his seat upward? If he is thrown forward the head goes forward first.

Q If he was thrown out of his seat?

A If he were just tossed sideways, no, it wouldn't be the same thing.

Q That wouldn't be a whiplash?

A But if he landed on his head and had his head suddenly tilted to one side the end result would be a neck injury.

Q If he had no neck injury reported, and you wouldn't know just how he fell out of his passenger seat in May of 1970, could you say with a reasonable degree of certainty that he would have had a whiplash injury?

A No, I can't say I could.

Q So it depends upon how he was thrown, isn't that correct?

A It depends in part upon how he is thrown and in part upon what it hurt.

Q And if he had no pains to his neck, never reported, no indication of pains to his neck, would it follow that he had a whiplash injury?

A It could.

Q And if he did it would be very, very minor, so unnoticeable that he wouldn't even know about it?

A I can answer that, but not with a word or two. I have seen patients in their 30's with evidence of injury to the neck, and on going over their past history there is a history of an injury such as diving into a pool or falling out of a tree or being in a car accident without any symptoms, but the x-rays showed they did have an injury, so that the symptoms themselves don't necessarily -- lack of symptoms don't denote that he didn't have an injury.

Q So in this particular case you wouldn't know one way or the other?

A That's correct.

Q As a matter of fact, in this particular case you didn't ask him if he had any intervening accident, did you, when you saw him last week?

A Yes, I asked him what's happened since I saw him last.

Q Did you ask him if he had any injuries?

A Not specifically, no.

Q Did you ask him if he had any diseases?

A No.

Q Did you ask him if he was in any way affected

to any part of his body that was affected in the accident of November 1968?

A I simply asked him what had happened since I last saw him.

Q And what did he say?

A He told me that he returned to work after I saw him, shortly after, worked for awhile, his neck hurt him, he stopped, had treatment, went back to work, worked for awhile, found that he couldn't manage any more and stopped working about a year and a half ago.

Q Incidentally, you didn't prepare any written report since the accident -- correction, since the examination last week, did you?

A An incomplete one, and the reason it's not complete is because I anticipated being called before I could finish it, so I held it.

Q When you examined him in March of 1968, that was a full 14 months before the accident in which he was a passenger in a bus, is that correct?

A March 1969.

Q March 1969. And Mr. Herbert, I believe, told you that he was involved in a bus accident some 14 months later.

A Yes, sir.

Q And in March of 1969, when you examined him, some 14 months before the bus accident, you at that time noticed that Mr. Batchkowsky had some problems, is that correct?

A Yes, sir.

Q And as a matter of fact you didn't tell us in response to Mr. Herbert's questions everything that you found wrong with Mr. Batchkowsky when you examined him in March of 1969, did you? Did you leave something out?

A Not that I can recollect that is important. If I did, please correct me.

Q Let me see if I may help you.

I have a copy of your report of March 10, 1969, which the railroad has been gracious enough to give me. On page 4, I take it that these were your findings, neurological examination, upper extremities. What's a neurological examination, Doctor?

A Neurological examination is testing for any nerve pathology, peripheral nerve, and also applies to central nervous system, but I limited it to the upper extremities here.

Q That is to see if it man has any problems among other things with his nerves?

A Yes,sir.

Q You made certain, I think doctors call it objective findings, is that correct?

A Yes, sir.

Q Can you distinguish an objective finding from a subjective finding?

A Yes, I think.

Q Would you please, for our benefit?

A Surely.

Q What's an objective finding?

A An objective finding is something that is out of the control of the patient, that you observe in one way or the other, seeing, feeling, or testing, and with some instrument. An objective finding would be an x-ray, a reflex change, if the patient is relaxed.

Q When you examined him in March of 1969, which was some four months or a bit more than four months after the railroad accident, and 14 months before the bus accident, what did you find with respect to objective neurological findings?

A Nothing. I found some subjective sensory changes.

Q You said, and I am quoting, "Sensation to pin prick stated to be absent over the volar surface of the outer four fingers of the right hand and the dorsum

of the outer four fingers of the right hand with more loss over the right and little fingers and he has some sensation along the sides of the fingers. Thumb is spared. Sensation left hand intact. Reflexes upper extremities equal and active."

MR. GAUS: May I have my objection noted to counsel reading from material that is not in evidence.

Q I merely want to say, was that your finding?

A That was a finding of a subjective complaint.

Q Do you have any reason to believe that when he said that he had a lack of sensation in a certain portion of his right hand that he was simulating at that time?

A Not simulating, but --

Q Do you have any reason to believe that he was exaggerating at that time?

MR. HERBERT: May the doctor finish his answer.

THE COURT: Yes, you said but not what?

A But not objective. In other words --

Q Do you have any reason that what he told you was untruthful?

A To him, no. To me, yes.

Q You mean he thought it was the truth, but

you thought it was not the truth?

A I had evidence that it was not a reliable finding.

Q He also complained to you about pains going down the back of his left shoulder. Did you have any reason to doubt him on that?

A No, sir.

Q Was he truthful in your estimation with respect to that complaint?

A Yes, sir.

Q And that is a subjective complaint?

A Yes, sir.

Q You also noted on inspection -- I take it this is your examination -- that he had a slight tenderness on palpation of his forehead. I take it that was a fact.

A It's a subjective complaint, but it seemed reliable.

Q And this is some four or four and a half months after the accident, is that correct?

A Yes, sir.

Q With respect to his ribs you questioned whether he had a fracture because you didn't find any callous formation even though some four months had elapsed, is that correct?

A I didn't find a fracture line, I didn't see callous. It's unusual four months after a fracture not to see callous formation.

Q Callous is a bone deposit, is it not?

A Yes.

Q It's calcium?

A It's calcium and protein matrix. It's new bone.

Q You were surprised you didn't see that formation?

A Yes, sir.

Q You also found some four months or a bit more than four months, close to four and a half months, after the accident, a discolored area of healed abrasion at the inferior corner of the right scapula. You didn't tell us about that before, did you?

A No, I was summarizing my findings.

Q Did that have any significance to you?

A Yes.

Q Some four and a half months after the accident, what significance did that have?

A That means he had a direct blow there and the evidence was still present.

Q And would the fact that it was still present

some four and a half months after the blow indicate to you that it was a severe blow?

A It certainly suggests it, yes, sir.

Q In the course of responding to Mr. Herbert's questions I believe you used on two occasions the word bursitis.

A Yes, sir.

Q Did you at any time indicate in this report or use the word bursitis?

A Calcium deposit.

Q Did you use the word bursitis?

A It's synonomous, but I don't believe I used it.

Q You used it twice testifying.

Did you at any time put it in your report or indicate bursitis in your report?

A I did by saying calcium deposits.

Q Did you use the word bursitis, doctor?

A I am looking.

(Pause.)

A No, I did not.

Q You found when you examined him that he had osteoarthritic changes, didn't you?

A Yes.

Q Were you told when you examined him in March of 1969 that for some 17 or 18 years before when he first started to work for the railroad until the time of this accident, a period of some 17 or 18 years, he had no problems with his neck?

A Was I told it? I wasn't told how long he had worked for the railroad. I think I did ask him a past history, and he said no prior problems.

Q Was it made known to you either by the railroad or Mr. Batchkowsky that over a course of some 17 or 18 years he had no injuries to his neck, no complaints to his neck, no problems with his neck, all during the time that he was actively working as a brakeman? Was that made known to you?

A As I said, he told me that he never had any prior accidents. He didn't tell me how long.

Q Was it your determination in March of 1969 that as a result of this accident which occurred on November 8, 1968, something happened which caused him to have pains in his neck?

A Yes, sir.

Q And this something which caused him to have pains in his neck also gave him problems with respect to the movement of his neck, is that correct?

MDpa 135 Balensweig-cross

A Yes, sir.

Q And would it be fair to conclude with a reasonable degree of medical certainty that except for this accident which occurred on November 8, 1968, he would have had no problem with his neck?

A It's not fair to conclude never, but --

Q I didn't say never. Wouldn't have had problems with his neck.

A At the time I saw him it's reasonable to conclude that, yes, sir.

Q Would it be also fair to assume that for a reasonable time after 1968, well past or for some years past his 53rd year which he was in at the time, he would have had no problem with his neck?

A Yes.

Q Would that be fair?

A That is fair.

Q Would it be fair also to assume that except for this accident of November 8, 1968, he would have continued to work actively as a freight brakeman without any difficulties to his neck?

Would that be fair?

A It's reasonable, yes, sir.

Q When you examined him last week I was in your

office also, is that right?

A Yes.

Q Was that last Wednesday, I don't remember?

A It was the 20th. Today is the 29th. I think it was Monday or Tuesday.

Q Did you try to move his neck at that time?

A Yes, I did.

Q Did he have a -- do you call it a normal or free range of movement of his neck?

A No, he did not.

Q Did you measure the limitation of movement of his neck?

A I did.

Q What was the limitation that you found?

A As far as looking up and down were concerned they weren't particularly limited considering that he has a round back deformity so that his head is way forward. Turning to the right and to the left was one half complete. For a young person it's limited by about a third. For a person of his age, -- in other words, 45 degrees is half of 90. I can't do 90 any more, I am getting a little older. As you get to be 59, 60, rotating to the right and left the average is about 70 degrees.

Q Is it your opinion that except for this

accident he would have had that limitation now?

A He would have gone to 70. I wouldn't expect him to go only to 45.

Q So you would say that he had a 25 degree loss in each direction, both left and right which he otherwise wouldn't have had, is that correct?

A That's not quite correct. He also showed arthritis previously. Fairly extensive in the small joints on either side. When I first x-rayed him they were a little bit increased, when I x-rayed him this time, and some of those limitations are due to arthritis.

Q Then you would say that he had more arthritis than usual for that age?

A For his age of 59, yes, he does. In the small joints, not in the mid-line.

Q And it's a recognized medical fact, doctor, is it not, that injuries to the neck could accelerate arthritic changes, can accelerate normal arthritic changes, is that a fact?

A It can.

MR. JURON: Thank you.

THE COURT: When you examined him after the accident in March 1969, at which time he was about 55 years old, would you say that the degree of osteoarthritis he had

at that time was abnormal for a man of that age?

THE WITNESS: Yes, it was.

CROSS EXAMINATION

BY MR. GAUS:

Q As I understand it, you took x-rays at that first visit, is that correct?

A Yes, sir.

Q Did you happen to bring the x-rays along with you?

A I did.

MR.CAUS:May we have them offered, if your Honor please. I offer them in evidence.

(Defendant Anheuser-Busch Exhibit H marked for identification.)

Q Both sets are in here?

A Yes.

Q Before we go into the x-rays, doctor, I merely want to clarify for the record and reiterate, when you saw Mr. Batchkowsky it was not for the purpose of treatment, was it?

A That's correct.

Q It was your function to examine him and to give an evaluation as to claims for injuries that he was making, was that not the case?

A Yes.

Q Insofar as the x-rays are concerned, I think you made reference to them. You have in the report that you gave to the railroad, I think there is reference to the cervical spine. Would you take the other x-rays of March 19, 1969, of the cervical spine, please.

A Yes.

Q You may follow, so you will know what I am asking, doctor. With relation to your report I think you make mention of reviews of the x-rays on page 5 of that report if you wish to follow it.

A Yes. I can read them without the report.

Q Relative to the cervical spine, I take it there is more than one x-ray?

A There are three x-rays.

Q Were there areas of calcification disclosed or displayed on those x-rays of the cervical spine?

A Yes.

Q Would you be good enough to put those you consider as disclosing that condition on the shadow box and point out to his Honor and the jury.

A I will put them -- this is a front view of the neck. This film was taken with the patient lying down on the x-ray table, and has to bring his chin up, and then

the film is placed behind his neck, the tube is in front of him. The right side of the patient is to your right hand. The calcium deposits which basically really are arthritic spurs are seen primarily on the left side and they involve what we call the facet joints, that's the small joints on either side of the vertebra, that allow you to turn, flex, and extend.

This is a spur. That is a rather large spur. This whole area is denser than it should be. This is a fair size spur. And that is a fair size spur there.

In the side view of his neck -- and this is taken with the patient standing up -- these are March 18, 1969, you see calcification in the ligament that runs from the back of the head to the second dorsal spinous process. This is the calcification. That developes as you get older in some people and not in others. It doesn't really mean anything except that this patient was 54 years old at the time the x-ray was taken, and it's somewhat uncommon in a 54 year old. You generally see it in little older people, 58 on up, and it suggests he has a tendency toward somewhat premature arthritis. It doesn't produce any symptoms, that lump there.

This is a spur of the lower corner of cervical five. It's a medium size spur. He had a short neck,

high shoulders, I couldn't see the lower part of the neck, with the patient standing at that time.

Otherwise, this spine looks fairly all right.

The facet joints now can be seen here in back, and they show some increased density and some narrowing indicative of some arthritis. It's not extreme in that view.

The last film is what we call an oblique film. This is the right side of the patient, that's the left, and he is lying tilted. The reason I took only the left oblique was because the symptoms were running toward his left shoulder. This shows here's a fairly normal arthritic facet -- a fairly normal facet, but a good arthritic spur right there. That's in the upper neck. You see a narrow joint here, and a spur. You see a narrow joint there. And a very narrow joint there. All of the articular facet joints on the left side were arthritic, and the space that the nerve comes out of, which we call an inter-vertebral foramin lies between the facet joint and the body of the vertebra, and it's an oval hole, it shows up as a dark area there. This is in the upper neck, that is cervical one here, two there, and three there. This hole is slightly narrowed because of arthritis of the facet joint.

This hole is a little more narrow. That is between C-4 and C-4. The hole down here is very narrow between C-4 and C-5. And also narrow and poorly seen between C-5 and C-6. Those narrowings are due to arthritic changes in the neck. They may or may not produce symptoms, one depending upon how rapidly the narrowing occurs, two, depending upon whether or not the patient has had his head thrown around, and three, how small the space is.

As you get older you start to lose some fine sensation in your fingers, and by the age of 70 most people have lost some vibratory sense and some fine sensation in their fingers and it's due to these holes that the nerves come out of getting smaller and squeezing the nerve.

Q The last portion of your testimony is that given in an atmosphere absent an accident or absent trauma, when you say ordinarily a person getting older or in their 70's has some loss of sensation?

A Yes, sir.

Q In your experience, doctor, as an orthopedic specialist, an orthopedic surgeon, I believe you said, can you give us an opinion relative to those three x-rays you have just referred to of the cervical spine, as to whether or not in fact that condition of osteoarthritis as to

which you have just been talking was something which occurred within a period of four months time?

A Yes, I can.

Q What's your opinion?

A That it takes to develop even a small spur at least a year. These were rather diffuse arthritic changes. They had been developing for at least five to eight years.

Q So that what you are saying, doctor, is that these arthritic spurs, and the arthritic condition, at least to some extent, had been a developmental thing --

MR. JURON: Objection, your Honor. I think Mr. Gaus is at this point leading and suggestive.

THE COURT: I think so. The witness can answer a question that isn't leading if you want to rephrase it.

MR. GAUS: I thought I was permitted to lead on cross examination.

THE COURT: He is not an adverse witness with respect to this phase of the case as far as your client is concerned.

Q At any rate, doctor, is it your opinion that the osteoarthritis pre-existed the accident of November 8, 1968?

A It certainly did, yes.

Q With respect to the conditions of sensation of the hands about which you referred, is that something that has a basis in the nerves or inneurology?

A If you are asking whether a neurologist should evaluate it, it falls in the field of neurology. I think it falls in my field also.

Q Let's say this: We have heard from a man of your own specialty, an orthopedic surgeon, this morning, and we don't have benefit of a neurologist. Would you tell us with respect to the areas, I think you referred to specifically, C-4, C-5, and in which there was some spurring, and above that, closer to the head, I think C-3, 4 and 5, is what you were really talking about, is that not so?

A 3, 4, 5 and 6.

Q The nerves that extend to the fingers, where do they come from?

A The top of the shoulder, the C-4 nerve comes out of C-34 foramin. That is only up to here. The shoulder and going down to the thumb side comes out mainly of C-56, a part of that can come out at C-45, and C-56 applies about a third of the arm.

Q We have only had testimony relative to your

MDpa 145 Balensweig-cross

early x-rays. Do you have comparable x-rays of the most recent visit, and would you take a look at those of the cervical spine and analyze for us, if you will, the difference, if any?

A Yes. Since I showed the front view first in 1969, I will put it up again against the front view taken last week. It's not quite comparable because in '69 I took it lying down and in '75 I took it standing up. But the degree of arthritis is about the same allowing for difference in technique. There is a little increase in the arthritic spurs in the lower cervical facet joint on the left side between '69 and '75. The degree of change is not greater than I would anticipate in a period of six years. It's localized to the same area he had previously, being maximal in the low cervical spine, C-34, 45, and 56 on the left.

Q I would ask you now, doctor, if you would --

A I didn't quite finish.

Q I beg your pardon.

A That's all right.

The lateral view in '69 is to your right. A lateral view last week is to your left. Calcification in the ligamentum nuchae about the same size. The spur of the lower corner of C-5 is about the same size. There is

really no change between '69 and '75 in the lateral view.

The oblique view which I have reviewed this morning looks about the same between '69 and '75.

Q Thank you, doctor.

A You are welcome.

Q Before leaving the shadow box, I wonder if I could ask you, doctor, to take the x-rays that Dr. Burton has brought to Court and if you would be so kind as to give us your opinion or reading. It's Plaintiff's Exhibit 24 -- relative to the cervical spine. I think there are three x-rays, two of the cervical spine.

A The film was taken the same day that I x-rayed the patient. This is the lateral view. It looks basically identical with the film I took. This is another lateral view taken on the same day with basically no change in position. The chin is at the same level. He just took two laterals at the same time.

Q Could you tell from those two x-rays whether or not the plaintiff being x-rayed there was in different positions or whether different positions of the head was attempted by the doctor that took those x-rays?

A I can tell that the head didn't move significantly and whether or not he attempted to get flexion extension, I don't know. I got flexion extension and there is

MDpa 147 Balensweig-cross

a change.

Q Thank you.

A The A.P. view was taken with the patient lying down here, and this is the left side I presume, because that's where more of the arthritic changes are, and it looks the same as my film in 1969, and 1975.

THE COURT: You refer to it as an A.P. view. You mean a front view?

THE WITNESS: A front view, yes, sir. In this one you can see his chin is way up because you can see all the way up to the top.

Q Is that different in any way from the other two of Dr. Burton's?

A Yes.

Q Does it show a different movement of the head insofar as you can analyze it from the position of the chin?

A Yes, it does.

Q Finally, doctor, you have mentioned bursitis. Would you describe or define bursitis for us?

A Bursitis is actually supposed to be an inflamation of the bursa any place that lies next to a tendon or a joint. In dealing with this patient I found

MDpa 148 Balensweig-cross

calcium deposits in the supra spinatous tendon of the both shoulders in '69 and that is the muscle that runs from your shoulder blade, the top of it, over to the top of your shoulder and raises your arm sideways. And I called it a bursitis. I should have called it a calcinosis. It's only a bursitis when it hurts. They are practically synonomous when we talk about x-rays.

Q With respect to bursitis counsel has asked you whether or not indeed you had referred in your report to a bursitis and I think you said you didn't, but a rose by some other name --

MR. JURON: Objection, your Honor, I think we can do without Mr. Gaus' commentaries at this point.

THE COURT: Sustained.

Q Did you use terminology which in any way in substance or substantially was analogous to the use of the term bursitis?

A Yes, I did.

Q Is bursitis in any way painful, doctor?

A Calcium deposits hurt on and off. When it hurts we call it a bursitis. I also call it a bursitis when I see a calcium deposit in the tendon because it's known to hurt on occasion. It doesn't necessarily have to hurt.

Q Are we talking about the shoulder region?

A Yes.

Q When we are talking about this bursitis about which you speak?

A Yes, sir.

Q In this particular case we have heard testimony of the plaintiff concerning pain in the shoulder. Is that consistent with your finding of bursitis? Pain in the shoulder.

A It's consistent with Dr. Burton's finding more than mine. Before I saw him -- when I saw him he had a little tenderness over the calcium deposit in the front of the shoulder and most of his tenderness was over the back of the top of the shoulder where you don't get pain from a bursitis.

Q In your expert opinion, and based upon your experience, do you have opinions concerning the duration of the bursitis that you found that first visit?

A Duration is many months to many years. I can't give you a specific length of time. I have seen a calcium deposit hang around for 20 years. My father x-rayed a patient and I have seen him 20 years later and there was the same calcium deposit.

Q Do you have an opinion as to whether or not

bursitis in itself predecessed the accident on November 8, 1968?

A I have an opinion, yes, sir.

Q And what's that opinion?

A That the calcium was there before the accident, that he might have had a simple bursitis on the left shoulder from the accident since he did respond to an injection of cortisone.

MR. GAUS: Thank you very much.

THE COURT: Any redirect?

MR. JURON: I have.

REDIRECT EXAMINATION

BY MR. JURON:

Q Isn't bursitis an inflamation of the bursa?

A Strictly, yes.

Q Did he have an inflamation of the bursa?

A When I saw him?

Q Yes, sir.

A Aside from a slight tenderness of the left shoulder, no.

Q As far as you know, did he ever have inflamation of the bursa?

A Before I saw him?

Q Yes.

A Not that I know of.

Q So when you are talking about bursitis you are not talking about an inflamation of the bursa, which bursitis is, is that right?

A I am talking about a calcium deposit.

Q A person can have a pain in the shoulder without it being bursitis, isn't that correct?

A Yes, sir.

Q You took x-rays, Mr. Batchkowsky consented to having x-rays taken in March of 1969, is that correct?

A Yes, sir.

Q Can you say with certainty that what you saw in March of 1969 when you took x-rays of his neck you would have seen if you had taken x-rays a day before the accident of November 8, 1968?

A Yes.

Q No difference?

A I can't say no difference in regard to the left shoulder. It was a smaller calcium deposit in the left shoulder than the right.

Q Can you say with certainty that if you had taken those x-rays some four and a half months before the day before the accident which occurred on November 8, 1968, that the x-rays of the neck on November 7, 1968 would

have been the same as the x-rays were when you took them in March of 1969?

Can you say that with certainty?

A Yes, I think I can.

Q And is it your opinion that you could have seen or would have seen that?

A Yes, sir.

Q Now, you have also said that you took x-rays last week, which is almost six years after you took the other x-rays of his neck, is that correct?

A Yes, sir.

Q And would you say that those six years were critical years with respect to the aging process, namely, the difference of a man of 54 and a man of 60?

A 54 to 59, yes, sir.

Q He will be 60 in March.

A Okay.

Q Those are critical years, are they not?

A Every year is critical to me.

Q Well, critical in the sense that if a person had normal arthritic changes aside from any accident the arthritis would become more severe in normal course during those years, would it not?

A Actually, that is an assumption that isn't

MDpa 153 Balensweig-redirect

proven. We see it increase steadily to a p. int and then sometimes it stays at a plateau for years and years, so you can't tell that this man is going to show more changes on an x-ray five years later just by seeing arthritis now. He may or may not.

Q You say he has been at a plateau for the past six years with respect to the arthritis of his neck?

A In respect to his x-rays there's been very little change.

Q And you say that he was at a plateau for a period of time before the x-rays were taken in March of 1969?

A Probably, yes.

Q Are you certain of that?

A The degree of a plateau and when the thing started I can't tell you. I can give you a time span.

Q Can you tell us for how long he was on a plateau before March of 1969?

A No, I can't.

Q Could it have been a year?

A It could have been months to a few years.

Q So it's possible that between November of 1968 and March of 1969, as you say a matter of months, there could have been some appreciable arthritic changes, isn't that correct?

A Not appreciable on x-ray. It takes three to six months to see any change on an x-ray in the way of change in an arthritic spur.

Q In other words, there could have been changes but they wouldn't have been revealed to you until sometime afterwards, is that correct?

A Correct.

Q Is it a fair assumption to say that given a man close to 50 -- I withdraw that -- a man 43 years of age, who had some arthritic condition for a man of that age, and superimposed upon that you had a trauma, that it would have certainly affected the normal progress of arthritis? Isn't that an accepted medical fact?

A Not unless you can prove it.

Q I am assuming that there was a blow.

A No, I am not talking about that. How are you going to prove that it seriously affected the arthritis unless you get follow-up x-rays?

Q In other words, it could and it couldn't have?

A That's right.

Q It's possible one way or the other?

A Yes, sir.

Q Now, if a man has been functioning before the accident and following the accident has difficulty in

functioning, and assuming that he is a fairly honorable, honest man, would you say that in all probability the accident affected his arthritis?

MR. GAUS: May I raise objections to assumptions about honorable and honesty, and so on. I think that only the jury is here to determine the credibility of a witness. I strongly object to inserting that into a question to this doctor.

MR. JURON: I would agree with Mr. Gaus the question of credibility is always before the jury, but I am asking him to assume that a man is giving him an accurate and fair history. That he's unable to work. Is it fair to assume that such functional disability can be attributed to a trauma or accident that is superimposed upon an underlying normal arthritic condition?

THE COURT: I think the question is vague in that it refers to such things as inability to work, and so forth. That depends upon the kind of work a man is doing, the extent to which he is disabled, and so forth.

MR. JURON: May I specify the duties then, your Honor, and put it to the doctor in that way?

THE COURT: You can try to frame a hypothetical question referrable to the testimony in the case.

Q As Mr. Herbert brought out, you have had a

MDpa 156 Balensweig-redirect

lot of experience examining complaints in railroad cases, is that correct?

MR. HERBERT: I object to that. I didn't say a lot, I said some.

MR. JURON: He has had a lot. Come on now, Mr. Herbert. This is the fifth case in four months you have been at.

MR. GAUS: I object to counsel testifying.

Q There have been a number of cases you have been testifying on behalf of the railroad and I have been representing claims, is that correct?

A Yes. I have had adequate experience.

Q A lot of experience, right. And you are familiar with the duties of a brakeman, are you not?

A Yes.

Q You have examined any number of brakemen employed by railroads, and you are familiar with their job of going up and down ladders, isn't that a fact?

A Yes, sir.

Q And would you say that if a man such as Mr. Batchkowsky, age 53 years of age, for 17 or 18 years had no problem -- assume he had no problem going up and down ladders and turning his head around, and fulfilling all of the arduous job of a brakeman in freight yards, and

following this accident he has had increasing difficulty and until finally he reached the point where he says he could no longer do that job, namely, going up and down ladders and switching cars, is it fair to assume that the accident which occurred on November 3, 1968, so activated this arthritic condition which you say he had at that time as to render itimpossible for him to do those particular duties?

MR. HERBERT: Your Honor, this is going far beyond the recross examination, and I object to it.

MR. GAUS: I join in the objection.

THE COURT: I sustain the objection in any event. I don't think it's a proper hypothetical question.

Q Doctor, when you saw Mr. Batchkowsky in March of 1969, you suggested that he still required medical attention?

A Yes, sir.

Q In fact, you had been informed that he was under the care of Dr. Burton?

A Yes, sir.

Q And you know Dr. Burton, or course, right?

A Yes, I do.

Q And at that time Dr. Burton was of the opinion, I will put it to you he testified as such, that he felt that Mr. Batchkowsky would reach a point where he would come

out of his problems and resume doing his normal job as a brakeman, and that was your opinion as well, is that correct?

A Yes, sir.

Q And your experience as an active orthopedic surgeon over a course of some 25 years you have had experiences where you have had patients where you felt that a patient was coming out of their difficulties and as it turned out they did not and had a continuous problem?

MR. HERBERT: Your Honor, this is not proper recross examination. The plaintiff has already cross examined the doctor on one occasion and I don't think it's necessary to give him additional time to ask further questions.

THE COURT: He hasn't finished the question yet. Let's hear where he is headed with this question. So far he has made a statement.

MR. GAUS: I object to any summation.

THE COURT: Let him finish his question, if he is going to end it up as a question.

Q You have had experience where patients with similar conditions, you thought that the condition would clear up in a short period of time and it turned out that it was a protracted and permanent condition. You have had

such experiences, have you not?

MR. GAUS: I will object to this kind of question.

MR. HERBERT: I object to the form of the question, too.

MR. JURON : Counsel has been dealing with the permanency of the injury, the fact that he had an underlying condition. I think they have introduced on Mr. Gaus' cross examination a more than exhaustive area to allow for such questioning.

THE COURT: Actually, we have had no redirect from Mr. Herbert at all. I thought he was going to conduct a redirect, and when I asked if there was any redirect you stepped up and started more cross examination. I allowed you to do it because Mr. Gaus had intervened. It's not -- well, let's put it this way. It's questionable whether or not it's proper recross examination, but it seems to me that in any event it's an improper question in that it doesn't seem to be heading to any admissible testimony.

MR. JURON: Very well.

Q Now, you were asked by Mr. Gaus to look at an x-ray that was taken by Dr. Burton showing the chin in a raised condition, is that correct?

MDpa 150 Balensweig- redirect

A Yes, sir.

Q Could you put that plate back on the shadow box, if you would, please, doctor.

A That's the front view.

Q Yes. I think you said A.P.

A Yes, sir.

Q Looking at that x-ray you see the lower part of his head, is that correct?

A Well, looking at the x-ray you see the chin --

Q Do you see anything above the area of his nose?

A I see the back of his head.

Q That's the back of his head?

A Way back there.

Q Do you see the upper part of his head?

A No, the top half of his head, no.

Q From that x-ray could you tell whether the head had been forced back by Dr. Burton or whether it was a voluntary act on the part of Mr. Batchkowsky?

A I can't tell.

Q And so you wouldn't know whether his head had been forced back and whether he was in pain at the time the x-ray was taken or not, is that correct?

A Correct.

MR. JURG N: Thank you, doctor.

MDpa 161

THE WITNESS: You are welcome.

THE COURT: Mr. Herbert?

MR. HERBERT: I have no redirect, your Honor.

THE COURT: Thank you, Dr. Balensweig.

(Witness excused.)

THE COURT: I assume the defendant rests?

MR. HERBERT: Yes, your Honor, that's correct.

THE COURT: I assume the third-party defendant also rests?

MR. GAUS: With the exception of an item we had found that I don't think has anything to do with the injury. It's an item now on the table and has been marked. We have agreed this should go into evidence. It's Exhibits G and H. With that, I am prepared to rest, your Honor, when these documents are all fully marked.

THE COURT: Is there any rebuttal, Mr. Juron?

MR. JURON: No, sir. Just one reservation. We have yet tomark the exhibits which have been noted, the exhibits being the part of the correspondence records of the railroad, which is a bit of housekeeping Mr. Herbert and I will take care of tomorrow. Also --

* * *

MDpa 265

On behalf of Mr. Batchkowsky and myself, I want to thank you for your attention and your kindness.

Thank you.

THE COURT: We'll take our noon break now. It's 1:25.

We'll come back at 2:30.

I will give you the charge at that time.

(Luncheon recess.)

- - -

AFTERNOON SESSION

2:30 P.M.

(In open court, jury present.)

THE COURT: Ladies and gentlemen of the jury: You are now about to enter on your final function as jurors, and that is to decide the facts of the case. You as members of the jury are the sole and exclusive judges of the facts. You alone pass on the weight of the evidence, the credibility of the witnesses, and you determine the reasonable inferences to be drawn from the evidence.

It's my duty now to instruct you as to the law, and it's your duty to accept these instructions as to the law and to apply them to the facts as found by you in your deliberations. In other words, you should not allow any preconceived notions that you might have had about what the law ought to be to interfere with you in applying the

MDpa 266

law as I tell you it really is. You must accept my instructions as to the law regardless of whether you agree with the law.

In your determination of the facts you rely solely on your own recollection of the evidence. What I may have siad from time to time during the trial, and what I say now in this charge, and whatever counsel may have said during the trial or whatever they said in their summation or in their opening statements, are not to be taken by you in place of your recollection of the evidence. No comments by counsel or the Court are evidence, and you are to draw no inferences from those comments.

During the course of the trial I have naturally been called upon to pass on the admissibility of evidence and upon objections made by counsel, and motions made by counsel. You are to draw no inferences from any rulings that I may have made or any statements I may have made in the course of those rulings. These relate solely to matters of law and they should not concern you in determining the facts.

Neither are you to be concerned by the fact that I may have asked questions of the witnesses, or the nature of the questions that I asked. When I asked a question I did it only to try to clarify a point that I

thought was unclear. So please don't allow the fact that I asked a question or the nature of the question which I asked to give you any idea about how my thinking might be about the merits of the case. That is only for you to determine.

If I at any time during the trial instructed you to disregard either a statement of counsel or a part of an answer given by a witness or an entire answer or a group of answers, you must follow those instructions and put those remarks or that testimony entirely out of your mind in determining the facts.

Also, you must ignore any comments that were made by the witness which were not in response to a question. As I have told you repeatedly, the evidence which you should consider in determining your verdict consists only of the testimony given by the witnesses on the stand in response to questions, the portions of depositions or answers to interrogatories which were read into evidence, the stipulations of fact, and, of course, the exhibits which were introduced into evidence.

You should perform your jury duties logically and without emotion. You should consider the entire record, the testimony of all the witnesses, and all of the exhibits.

Of course, it's entirely up to you, and to you alone, to determine what weight to give to the testimony of any witness.

You may draw inferences from the testimony, but you are not supposed to draw inferences based on other inferences. You draw inferences only from evidence.

Your verdict should not be based on speculation or conjectures. You should consider both direct and circumstantial evidence. Direct evidence is where a witness who saw a thing or an event testified to what he saw or heard or felt. In other words, what he knows of his own knowledge and what came to him by virtue of his own senses.

Circumstantial evidence, on the other hand, is evidence of one fact which tends to establish another fact at issue because of the logical relationship between the two facts.

The law makes no distinction between the weight to be given direct evidence and that to be given circumstantial evidence. Both should be considered by you in determining your verdict.

In this, as in every case, we begin with the fundamental proposition that the plaintiff having brought the action has the burden of proving the necessary elements

of its claim by a fair preponderance of the credible evidence.

That term fair preponderence of the credible evidence means the greater weight of the evidence. It refers to the quality of the evidence, not its quantity. In other words, not the number of witnesses or the number of exhibits. It means that the evidence in behalf of the party on whom rests the burden of proof must have more convincing weight than that of the opposing party or parties.

You may say that a fact has been proven by a fair preponderance of the credible evidence when after considering all of the credible evidence relating to that fact you are persuaded to believe the existence of the fact.

If you believe that the credible evidence relating to a particular fact at issue is evenly divided between evidence tending to prove that fact and evidence tending to disprove it, then you must conclude that particular fact against the party who has the burden of proof as to that fact, and I have said as to the necessary elements of the plaintiff's claim the burden is on the plaintiff.

There is one issue that I will cover during

the course of the charge as to which the burden is on the defendant, and that is the issue of contributory negligence.

Now, let's turn to the actual issues in this case. As you have been told, this action is brought pursuant to a federal statute known as the Federal Employers' Liability Act, which relates to injuries to railroad employees and allows a railroad employee to sue his employer to recover damages for injuries caused by the negligence of the employer.

That act provides, in part, and I quote: "Every common carrier by railroad," -- and here the Penn Central is a common carrier by railroad, -- "shall be liable in damages to any person suffering injury while he is employed by such carrier." And here it's admitted that at the time of his injury the plaintiff was employed by the predecessor of the Penn Central Railroad -- "for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, road bed, works, boats, wharfs, or other equipment."

Now, the Federal Employers' Liability Act

does not make the defendant railroad a guarantor or insurer of the safety of its employees. Under the Act the railroad's liability arises not from injury alone but from negligence which causes injury. In other words, the mere happening of an accident does not mean that the railroad is negligent or that the railroad is liable to the plaintiff. The railroad must have been negligent.

As used in the Federal Employers' Liability Act the word negligence means lack of care under the circumstances. In other words, the failure to do what a reasonable and prudent man would ordinarily have done under the same circumstances, or doing what such a person wouldn't have done under the circumstances.

The mere fact that employment is dangerous does not necessarily mean that the employer is negligent. No employment is completely free of danger, and particularly that is true of railroad employment. So in order to recover on an action under the Federal Employers' Liability Act the dangers or defect must be one which involves negligence on the part of the employer.

Now, in this case the negligence of the defendant railroad is alleged to consist of the failure to provide plaintiff with a reasonably safe place to work as the Federal Employers' Liability Act requires it to do.

The law requiring railroads to furnish its employees with a reasonably safe place to work does not contemplate the absolute elimination of all dangers, but only the elimination of those dangers which could be removed by reasonable care on the part of the railroad.

The degree of care to be exercised by the railroad must have some reasonable relationship to the ability of the railroad to perform that duty.

The duty which the act places upon the railroad employer -- that is, the duty to use reasonable care to furnish its employees with a safe place to work -- is non-delegable. That is, the railroad cannot escape its responsibility by claiming that they delegated or transferred to someone else its responsibility to provide the plaintiff with a safe place to work.

The duty extends beyond the premises of the railroad to property which third parties had a primary obligation to maintain. The duty includes the responsibility to inspect the property of third parties and to take precautions to protect employees from possible defects or dangers which could reasonably be eliminated.

Negligence under the Federal Employers' Liability Act may be predicated upon the acts or omissions of employees. In other words, the defendant railroad is

responsible for the acts and omissions of its employees and agents. This is because this defendant, like most railroad defendants, is a corporation and can act only through its employees and agents. If you find that an act or omission of an employee of the defendant other than the plaintiff to have been careless or negligent, then the defendant is responsible for that carelessness or negligence.

In that connection, a railroad is bound to inspect the cars of others which are used on its tracks just as it would inspect its own cars, and the railroad is responsible for the consequences of all such conditions in such cars as would be discovered by ordinary inspection.

If you find by a preponderance of credible evidence that the defendant was negligent in any of the respects claimed by plaintiff, and that such negligence played any part, however slight, in producing the injury for which damages are sought by plaintiff, then you should return a verdict for the plaintiff reduced, as I will explain further in a moment, to such extent as the injury was caused by the plaintiff's own contributory negligence, if any.

Plaintiff has the duty to exercise reasonable care and caution for his own safety and is obligated to see

that which would be obvious upon the ordinary use of his own senses. As the danger increases so does the plaintiff's duty to exercise a greater care to avoid such danger. The same standardsby which you measure the conduct of the railroad in determining whether it was negligent in causing the plaintiff's accident are to be applied by you in determining whether the plaintiff himself was also negligent.

If you find by a preponderance of the credible evidence that plaintiff was provided with a reasonably safe place to work, or that plaintiff failed to exercise reasonable care for his own safety and that such failure was the sole cause of the plaintiff's accident, then your verdict, of course, will be for the defendant.

If, on the other hand, you find that both the railroad and the plaintiff are guilty of negligence contributing to the plaintiff's injuries then the plaintiff is entitled to recover damages from the railroad, but the amount thereof must be reduced in proportion to the amount of negligence attributable to the plaintiff, as I will explain further in a moment.

Now let's turn to the matter of damages and how damages are to be computed. Incharging you with respect to damages I don't mean to imply or give you the

MDpa 275

impression that you should find that plaintiff is entitled to some recovery. That is for you and you alone to determine. But in the event you do find that plaintiff is entitled to a recovery I have to tell you how you should go about computing the damages. But bear in mind it's for you and you alone to determine whether there is any recovery at all to be found.

In figuring damages, you must figure damages at such amount as will fairly compensate plaintiff for his injury. Your purpose is not to punish the defendant for any fault or wrongdoing, nor is it to enrich the plaintiff. The award must be fair and reasonable and measured by the nature and extent of the injuries received.

There are three elements of damages which you should consider here. The first is pain and suffering, past and future. The second is loss of earnings, past and future. The third is disability or loss of bodily functions.

I will discuss those separately. First, with respect to pain and suffering, plaintiff is entitled to recover damages for pain and discomfort which resulted from his injury -- that is, the injury which took place in November 1968 at the Anheuser-Busch plant.

There is no formula or yardstick which the law

can give you with respect to this element of damages. You must use your own good judgment and common sense. But any award that you do make must be fair and reasonable and must be measured by the pain and discomfort which the plaintiff has actually endured as a result of the injury in question or which he will endure in the future.

Now, with respect to loss of earnings, plaintiff is entitled to be reimbursed for the loss of earnings he suffered as a result of the accident here involved from the time he was injured up to the present date, and if you find that as a result of this injury he suffered a diminution of his future earning capacity then he is entitled to additional compensation for the reduction in his future earnings.

At the time of the accident the plaintiff was 53 years old, and had a work expectancy, according to the work expectancy tables, of 12 years.

Now, such tables are nothing more than statistical averages. They **do not** assure that the plaintiff would have that span of working life, and you are perfectly free to conclude that he would work either more or less than that number of years from the time of his accident. That figure I give to you for your considerati and for such weight as you may choose to give it in conjuncti

with all the other evidence in the case and your own experiences and common sense.

You may recall there is an exhibit which shows the plaintiff's earnings during certain years commencing in 1968, so there you don't have to speculate what he actually earned during that period. However, it's for you to determine what he would have earned if it had not been for the injury in question, if, of course, you have found that the **defendant** was negligent and that the plaintiff's injury was attributable at least in some measure to that negligence.

With respect to the question whether the plaintiff, Mr. Batchkowsky, could have obtained other work, an injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury by resuming gainful employment as soon as that can reasonably be done. If he makes no reasonable or genuine effort to do so, he is not allowed to recover money damages for a loss of earning capacity, by which I mean that in determining the amount to be awarded to Mr. Batchkowsky for loss of earnings you must take into account the amount he could have earned if he had made reasonable efforts to do such work as he was capable of. If you find that he did not make

reasonable efforts to obtain employment, then you will deduct from his loss of earnings the amount which you found or find he should have been able to earn if he had made reasonable efforts to obtain employment of which he was capable.

With respect to all of these issues of damages the burden is on the plaintiff to establish by a fair preponderance of the credible evidence that he has suffered a loss of earnings as a result of this accident, and that by reasonable efforts to obtain other work of which he was capable he wouldn't have been able to mitigate the loss. To explain it further, if you find that by reasonable efforts he could have mitigated the loss then you must deduct the amount by which he could have reduced the loss from his total loss of earnings.

The third element of damages is disability, or loss of normal bodily functions and capabilities.

In determining this element you should consider what sum of money will fairly compensate the plaintiff for the impairment of his normal physical activities and bodily functions as a result of the accident.

If you find that the plaintiff's injuries are permanent -- I am speaking now about the injuries resulting from the accident had at Anheuser-Busch in November 9th, 1968 -

you should allow damages for the future loss of these physical abilities and bodily functions. In this connection you would have to take into account the life expectancy of the plaintiff. As I told you a moment ago, he was 53 years old at the time of the accident, and at that time, according to the mortality tables, had a life expectancy of 22.9 years. Again, these tables are nothing more than statistical averages. They don't assure that he will have that lifespan, and you are free to conclude that he would live either a lesser or a greater time, taking into account his physical condition at the time of the accident and all of the other factors in evidence in conjunction, of course, with your own experiences and common sense.

You will recall that there was some evidence and some comment by counsel about a pre-existing condition of osteoarthritis. With respect to all three elements of damages, I therefore instruct you that the defendant railroad is chargeable for all the pain and suffering, all the loss of earnings, and all the disability suffered by the plaintiff as a result of the negligent act or acts of the defendant, even though the plaintiff had a physical condition or weakness which may have predisposed him to injury, or which may have exposed him to injury more severe in nature

MDpa 280

than he would have suffered if it had not been for the pre-existing condition.

In other words, if you find that without the injury in question plaintiff would have had no significant pain and suffering, no significant loss of earnings, and/or no significant disability, then you will not reduce the damages to any extent on account of the pre-existing condition.

If, on the other hand, you find that the pre-existing condition would have caused the plaintiff some pain and suffering, some loss of earnings, or some disability, even if the accident had not occurred, then you must deduct from your determination of the total pain and suffering, loss of earnings and disability, that portion which you find to have been attributable to the pre-existing condition.

We have here a plaintiff who is an individual. We have one defendant who is a large railroad. Another defendant who is a large brewery. The mere fact that we have an individual plaintiff against two large corporations should not in any way influence your judgment. Your verdict should be based upon a cool and dispassionate consideration of the evidence, and not upon any sympathy you might have for the plaintiff or any prejudice you

might have against the defendants. Every party is entitled to equal justice under the law.

In determining the fact issues, as I told you a moment ago, you are called upon to determine the credibility of the witnesses. Some of the witnesses may have contradicted other witnesses. Some of the testimony of some of the witnesses may appear to be contradicted even by documentary exhibits. In some instances a witness may even have contradicted himself. In determining the credibility of each witness -- that is, the believability of each witness -- and this applies to expert witnesses as well -- you must consider the logic of what he said, its relationship to all the other evidence in the case, how the witness conducted himself on the stand, whether he appeared frank and forthright or whether he was evasive, whether he had a personal stake or interest in the outcome of the case -- that is, whether he had any motive to falsify his testimony -- whether he was in a position to have personal knowledge of the facts about which he testified, whether he appeared to have good recollection of the facts about which he testified, and so on.

In other words, to use a colloquial expression, to determine the credibility of a witness what you do is to size him up to determine whether he seems to be

a reliable and trustworthy witness.

If you find that any witness wilfully testified falsely as to any material fact you may disregard the testimony of that witness in its entirety, if you decide to do so, or you may accept all of his other testimony or you may accept such of his other testimony as you see fit. In other words, the effect of a false statement on the part of a witness is entirely up to you. You give it such effect as you believe it should have under all the circumstances.

Now, we have had testimony from two expert witnesses in the case. The weight to be given an expert witness, like the weight to be given the testimony of any other witness, is entirely up to you. You will judge their testimony on the same basis that you would judge the testimony of any other witness, as I indicated a moment ago.

When you go back into the jury room in a moment for your final deliberations you will probably find that you start out with varying points of view. The purpose of your jury deliberations is for each of you to participate and express your own points of view, but to do so with an open mind, to listen carefully to what other jurors are saying, and to reconsider the position you initially express

in the light of the expressions of others, to see whether or not you are now persuaded that the position you originally expressed should be modified or even changed completely.

Don't take a stand and refuse to budge simply because you took it to begin with. Keep an open mind. That isn't to say that you ought to give up a point of view that you sincerely and conscientiously believe in merely because you are outnumbered.

The verdict of the jury must be unanimous. That is, it must represent the conscientious decision of each and every one of you. The purpose of your deliberations is to try to arrive at a single verdict which does represent the ultimate viewpoint of each of you, if that is at all possible.

You will probably find during the course of your deliberations at some point that you can't remember what was said by a witness on a critical matter. If you want any of the testimony reread if you will send out a note to me through the marshal who will be posted at the door of the jury room we can have the court reporter reread the relevant part of the testimony.

If you want to see any of the exhibits if you will send out a note to me we will send that exhibit into

you for your use in the jury room. We won't give you all the exhibits until you ask for them because many times you will find that you don't need them, and we don't clutter up your deliberations by asking you to read a lot of exhibits that you don't feel you need to see. If you can't remember any part of the charge, or if I have failed to make any part of the charge clear, and you want anything repeated or explained, again if you will send out a note I will be glad to try to either amplify or clarify the charge.

I have prepared here a list of questions to simplify your ultimate verdict. I will read the questions to you.

Question 1: Was plaintiff injured as a result of defendant's negligence?

You will note this is really two questions in one. In order to answer that question yes you have got to find first that the defendant was negligent, and, second, that the plaintiff's injury was attributable at least to some degree to the negligence.

That question is to be answered yes or no, and there is a blank out to the right.

The jury foreman, who is juror number 1, Mrs. Kefini, unless she decides she'd prefer not to be

foreman -- then you can select someone else of your number to be foreman or forelady or foreperson, if you prefer -- she'll write the answer out here, either yes or no.

Now, if the answer to question one is no, no further questions need be answered. Obviously, that amounts to a verdict on behalf of the defendant.

If, on the other hand, the answer to question 1 is "Yes," please answer questions 2 and 3.

Question 2 reads: What amount of money will fairly compensate plaintiff for this injury? Then there is a blank for a dollar amount.

Now, in determining that amount you will take into account the three elements that I referred to earlier, namely, pain and suffering, secondly loss of earnings, and third the loss of bodily function or ability.

Third: Was plaintiff's injury attributable in part to his own negligence? That is the question of contributory negligence I discussed with you.

If the answer to question 3 is no, no further questions need be answered. In other words, if you find that the plaintiff was not negligent, or that his negligence did not in any way contribute to his injury, then you need not answer the other two questions, numbers 4 and 5.

If,on the other hand, the answer to question 3

is yes, then you go on to questions 4 and 5.

Question 4 is: To what extent did plaintiff's own negligence contribute to his injury?

Here there is a blank with a percentage sign. You can answer anywhere from 0 percent up to 100 percent. Of course, if it's 0 percent then you would have answered question 3 "No," but you can answer here anywhere from 1 percent up to 100 percent.

Question 5: What's the net award to plaintiff? (Amount in question 2 less percentage in question 4.)

Now, strictly byway of example and not to suggest to you any figures at all, let's assume that you have found that the amount of money which will fairly compensate plaintiff for this injury is $50,000.

Now, forget that amount except for purposes of illustration. You may find it's $5,000, you may find it's $500,000. I am only using it for illustration.

Now, if you find that plaintiff's own negligence contributed 20 percent to his injury -- again, this is just an illustration, you may find, as I have said, anywhere from zero percent up to 100 percent -- assume it's 20 percent, then you would take 20 percent of $50,000, which is $10,000, subtract the 10 from 50, and what you would write in the last blank is $40,000. That is the net award to the

plaintiff. In other words, total injury, $50,000, less 20 percent contribution by plaintiff's own negligence, gives a net of $40,000.

I don't think you will have any problem with that, and again I emphasize to you I have furnished you this form only for your guidance, and I have given you that illustration of specific numbers only for purposes of understanding what the form means when it says amount in question 2 less percentage in question 4.

You may find, and probably will find, both the amount of total damages necessary to compensate plaintiff for his injury to be different from what I have suggested, and you will probably find the percentage of contribution, if any, to be different from what I have suggested.

Now, there is a place at the bottom for signature of the jury foreman or foreperson, and the date.

Each one of these five answers must represent the unanimous vote of the jury, if that is possible.

I will see counsel at the side bar, please.

(At the side bar.)

THE COURT: Any suggestion or exceptions?

MR. JURON: Plaintiff has no requests nor exceptions, Your Honor.

MDpa 289

MR. HERBERT: Just one small item, your Honor. When you charged the jury on the future life expectancy you charged on life expectancy from the date of the accident.

THE COURT: I thought I made that clear but I will clarify it.

MR. HERBERT: I think it would be appropriate to charge his age as of now, as we are discussing the future.

THE COURT: I didn't have that figure. Nobody submitted to me a proposed charge except the one which gave his life expectancy from the date of the accident.

MR. HERBERT: I am cognizant you may not be aware of it. He was now eight years and ten months and his life expectancy would be 18 years three months rather than 22 years.

THE COURT: You would be better off if I leave it from the date of the original accident.

MR. HERBERT: Yes.

THE COURT: You hurt yourself by that suggestion. I will allow you to withdraw it, and I take it Mr. Juron is agreeable.

MR. HERBERT: No exceptions, no requests.

MR. GAUS: The only exception the third party defendant Anheuser-Busch has is in respect to item number on

amounts mentioned. I do concede that the Court has instructed the jury that the examples were not suggested amounts but if I were in the position of having heard counsel for two other litigants in the case suggest amounts to the jury and the Court suggest amounts to the jury and I do not do so myself there may be some prejudice. In that sense I raise an exception.

THE COURT: I tried to pick a figure that was the geometric mean between the figure mentioned by the plaintiff and the figure mentioned by the defendant.

MR. GAUS: With respect to the charge --

MR. JURON: I think the Court at four times at least emphasized it was for example purposes. I was concerned until the fourth time, your Honor.

MR. GAUS: With respect to the charge on the elements of damage, exception is taken to the conclusion that the damage particularly when disability was referred to, and the charge on disability, that such be reduced by the amount which had pre-existed injury affected the injury. This I submit was only part of the picture since I further submit an amount whatever the injury may have been, we have been given evidence there was a continuing and further injury, the amount should have been further reduced by any amount that was the amount sustained in the second

MDpa 290

accident, and whether any aggravation of second accident is presently a part of his injuries as testified to.

THE COURT: I think the charge limits the recovery to the amount of injury resulting from this particular accident, and I thought it was fairer not to specifically refer to the bus accident. That's been done by counsel in their summations.

MR. GAUS: I have nothing further.

(In open court, jury present.)

THE COURT: One thing I should clarify with respect to the charge. I referred to a work expectancy of 12 years, and to a life expectancy of 22.9 years.

Those periods are measured from the time of the accident in November 1968. In other words, at that time the plaintiff had a work expectancy of 12 years, and a life expectancy of 22.9 years. His work expectancy at the present time, of course, is substantially less, and his life expectancy is substantially less now than it was in 1968, of course.

We can excuse the alternate juror.

Mr. Keller, I think that we have come to the point where we can excuse you. I want to thank you for your kind attention during three and a half or three and two-third days. You understand that you served a very useful

function. In case any of the other jurors had to be excused for any other reason we didn't want to try the case all over again, but as it turned out they have all maintained their good health and disposition and we can excuse you.

(Alternate juror excused.)

(A marshal was duly sworn.)

THE COURT: May I see counsel for one moment at the side bar, please.

(At the side bar.)

THE COURT: Because it's now 3:30, it would be my disposition to tell the jurors what my normal practice is about letting them go in the evening. I normally will let them go about a quarter of 7, so that they can get to the subway by 7:00, and not be in any danger going home, so that they won't feel under any time compunction, that they have to render a verdict or be held all night, or anything of that kind. Is that agreeable to you?

MR. GAUS: Yes.

MR. HERBERT: Agreeable.

MR. JURON: Yes.

(In open court, jury present.)

THE COURT: Before you go in for your deliberations, I thought it might put your mind at ease to let

MDpa 292

you know what my normal practice is about letting the jury go in the evening.

Because I don't consider it 100 percent safe particularly for the lady jurors to be going home late at night I normally will excuse the jury for the evening at about a quarter of 7, so that you will have time to get your wraps and get down to the subway by 7:00, and get home at a reasonable hour.

I tell you that so that you won't feel under any time pressure and you won't be under any apprehension about being kept late tonight and wondering about whether you can get home safely, so don't feel under any compulsion to try to reach a verdict within any particular period of time. If you are excused tonight, you will just come back in in the morning at 10:00 and resume your deliberations at that time.

If, on the other hand, you find that you can return a verdict before that time, welland good, but this is an important case, it deserves your unhurried attention, and I am sure you will give it.

Again, I caution you that you should not discuss the case over the night in case we do excuse you for the evening with your family or with anyone else. Even though your deliberations have started you should not discuss

MDpa 293

the case with other jurors except in the presence of all the jurors.

Thank you.

(Jury excused at 3:35.)

(In open court, jury not present.)

THE COURT: Do I have some motions, Mr. Gaus?

MR. GAUS: Yes, I do, in the nature of motions addressed to the third party case.

You will remember plaintiff made motions addressed to the complaint, I never did, and I would have some if the Court's schedule is such that you would be in a position to take them now. I don't think they would be lengthy. I do have some motions I would address to the third party complaint.

On the other hand, if it's inconvenient --

THE COURT: As I had indicated to you earlier in the robing room, since I have not had an opportunity to study the side track agreement or the supplemental agreement or the lease I don't see how I could possibly pass on what I understand to be the substance of your motions.

MR. GAUS: I appreciate that.

THE COURT: I would have to reserve decision.

MR. GAUS: I had fully expected that your Honor would, and if your Honor wishes I would ask then in

view of that there will be I submit incorporated in whatever your Honor's finding will be of necessity a finding on questions of fact as well as the interpretation of the agreements. I submit to the Court that the agreements are there and will receive your Honor's attention insofar as the interpretation and construction. However, there are allegations in the third party complaint which I am prepared to address myself to apart from those agreements relative to matters on certain issues of fact which are brought in and have necessarily become a part of the third party complaint relative to matters of prima facie case.

I would address myself to those things and withhold addressing the matters on the third party complaint until your Honor sees fit to study them and has had time.

THE COURT: How long will it take you to make your argument?

MR. GAUS: I doubt it would take more than five minutes.

THE COURT: I have a defendant here that I am waiting to take a plea from. If it's going to take longer than five minutes I will go ahead and take the plea first. If it's going to take less, go ahead.

MR. GAUS: If that plea were scheduled earlier, we'll be here anyway, and after the plea I can do it at

that time.

THE COURT: Let's go ahead and take the plea. They have been waiting for awhile.

- - -

(In open court, 3:50 P.M.)

THE COURT: I am in receipt of a note from the jury which has been marked Court's Exhibit 1 and which reads as follows: "Testimony of conductor and engineer.

"All photo pictures, all medical records. Exclude x-rays. Wage scale and lost time.

"Pre-trial testimony."

Now, I take it that the jury wants to hear all of the testimony of the conductor and engineer, and they want to hear repeated all the pre-trial testimony which was read.

MR. HERBERT: When they refer to the testimony of the engineer and the testimony of the conductor perhaps they may be making reference to the statements that were offered into evidence.

THE COURT: Let's bring them in and find out.

(Jury present.)

THE COURT: I have opened your note, and I have read it to counsel, and I have a question about two

MDpa 296

of the items in the note. The first item is testimony of conductor and engineer. My question is, are you interested in the out of court statements -- that is, the accident reports which they signed, or are you interested in the testimony they gave in court?

JUROR NO. 6: The out of court testimony.

THE COURT: In other words, the written statements that they signed.

JUROR NO. 6: Yes.

THE COURT: Fine. They are exhibits in the case and we can send them in.

The last item is pre-trial testimony.

As you may recall, the pre-trial testimony was in the form of deposition transcripts. Only parts of those transcripts were read into evidence.

I cannot send you the whole transcript, that wouldn't be proper, because only the parts that were read are actually in evidence. Do you want to have the court reporter find in the record the parts which consist of the reading of portions of the pre-trial testimony? Is that what you want?

JUROR NO. 4: Yes.

THE COURT: All right. That will take a moment. I suggest that we send you in all of the exhibits

that you have asked for, and while you are looking that over the reporter can find in the record all of those points where pre-trial testimony was read.

Is that satisfactory to all?

All right. Then you may return to the jury room.

We'll send the exhibits right in to you.

MR. JURON: If your Honor please, if I might suggest there were parts read by the three of us, I believe, from the deposition.

THE COURT: I understand. Whoever read it.

MR. GAUS: Your Honor will recall that I volunteered to mark in the particular testimony -- I have my own marking system. I offer your Honor the transcript.

THE COURT: The only trouble is I am not sure that was complete, because Mr. Juron read some parts.

MR. GAUS: I kept it complete, one for Mr. Herbert, one for Mr. Juron and one for myself, and if it's of any assistance I offer it for the Court and the stenographer.

THE COURT: If Mr. Juron and Mr. Herbert look it over maybe you can agree in which case we can read through that rather than have the reporter go through his notes.

MDpa 298

(In open court, jury present, 4:15 P.M.)

THE COURT: In your note you asked to hear the out of court testimony, and as you may recall various portions of that out of court deposition were read at different times by different attorneys.

Rather than reading it just as it occurred during the trial, to give you a complete reading of the portions which were read in the order in which they appeared in the actual deposition, and not in the order in which they were read during the trial, so that you will get the continuity, we have had counsel and the reporter go through and mark all of the portions of the deposition which were read at the trial, and now we'll read them in that order, that is, the order in which they appear in the transcript of the deposition.

Mr. Gaus, who was the interrogating attorney at the deposition, will read the questions, and my law clerk, Mr. Aronson, will read the answers as they were given at the deposition by the plaintiff, Mr. Batchkowsky.

(Transcript read.)

THE COURT: The jury may return to the jury room.

(At 4:30 P.M. the jury returned to the jury room to continue their deliberations.)

* * *

JUROR NO. 2: No.

THE COURT: I am sorry, I can't give you anything else because the doctors' notes and records are not placed in evidence.

(Jury excused.)

(In open court, jury present, at 12:30 pm.)

(Roll call taken of the jury. All present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

JUROR NO. 1: Yes.

THE CLERK: How do you find as to Question 1, was plaintiff injured as a result of defendants' negligence? What is your answer, please?

JUROR NO. 1: Yes.

THE CLERK: Question 2: What amount of money will fairly compensate plaintiff for this injury? Your answer, please?

JUROR NO. 1: Two hundred thousand dollars.

THE CLERK: Was plaintiff's injury attributable in part to his own negligence? Your answer, please?

JUROR NO. 1: Yes.

THE CLERK: Question 4: To what extent did plaintiff's own negligence contribute to his injuries? Your answer, please?

JUROR NO. 1: Twenty-five pe cent.

THE CLERK: Question 5: What is the net award to plaintiff?

JUROR NO. 1: $150,000.

THE CLERK: Members of the jury, listen to your verdict as it now stands recorded. You say you find for the plaintiff Mike J. Batchkowski. Your answer to question No. 1 was "Yes." Your answer to Question 2 was $200,000. Your answer to Question 3 was yes. Your answer to 4 was 25 per cent. And your answer to Question 5 was $150,000. And so say you all.

THE COURT: I want to thank you all for the obvious attention you paid. As you know, sitting up here, I get a goo view of the jury. I often see, in other cases, jurors that are inattentive, occasionally nodding. But this jury I think paid unusually careful attention and you obviously gave thorou consideration to all the evidence.

I thank you very much for your time and effort.

MR. JURON: May I have permission of the Court to thank the jury on the part of defense counsel and myself. Thank you very much.

THE COURT: The jury is now excused.

(Jury excused.)

MR. HERBERT: Your Honor, at this time the defendant would move to set aside the verdict and for the granting of a new trial on the ground that the verdict rendered by this jury is contrary to law, contrary to the facts, against the weight of the evidence, and excessive.

THE COURT: I am going to deny the motion.

MR. GAUS: I don't suppose there would be any point in my making the same motion.

THE COURT: Consider it made and denied.

MR. HERBERT: And I move for a directed verdict on the same grounds, your Honor.

THE COURT: Denied.

MR. GAUS: According to the indications of last evening, I assume that we will have additional time for the third party action to be under consideration of the Court.

THE COURT: I will review the exhibits. If you want to give me any further citations or memoranda, do so promptly. If it appears that oral argument is desireable, I will let you know and we will schedule it as quickly as possible.

I want to thank you all. I think you all did a fine job.

MR. JURON: Thank you very much, your HOnor.

MR. HERBERT: Thank you very much, Judge.

MR. GAUS: I had hoped that your Honor would feel oral argument might be desireable. I have some misgiving as to whether or not in fact your Honor would after a conversation we had last night. I assure the Court that I will not be unduly verbose.

THE COURT: Well, please take my jocular comments in a light vein, as they were intended.

MR. GAUS: I do, sir.

THE COURT: I think there is obvious competence displayed by all counsel.

MR. GAUS: Thank you. It has been a pleasure to be here.

MR. HERBERT: Your Honor, the documents which the Court would require to decide this I assume will be the supplemental side track agreement dated November 14th, which is Exhibit 13, and we will leave that with the Court.

THE COURT: Yes. In fact, leave all three of the agreements, including even the lease agreement, in the event I want to look at it. I think it would also be well, since it is in evidence, to have that correspondence relating to it.

My present disposition, as I have already indicated, is that the supplemental agreement is clear and speaks for itself, and that I don't have to go beyond it. But in the

* * *

A 375

PLAINTIFF'S EXHIBIT 9

LETTER DATED MARCH 21, 1950

New York 1, N.Y., March 21, 1950.

Subject:- ERS 3-17-50: Newark, N.J. - Proposed clearance for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard.

E. R. S.:

Attached hereto is print of Drawing #R-1, revised March 6, 1950, showing in red the proposed bottling plant and, in yellow, the platforms that will be used in loading operations. You will note that the bottling plant is comparatively narrow and, in order to have the number of tracks required to handle the output, it is necessary that the distance between platforms and tracks be kept to a minimum.

This print is not final and the lengths of platforms will change, dependent on volume of output. However, it is anticipated that, when the plant is in full operation, platforms of about the lengths shown will be needed to handle the business.

With the conditions that are to be met, will you kindly give further consideration to granting the request contained in our letter of March 16, 1950.

K. J. S.

Returned to
TS

A 376

PLAINTIFF'S EXHIBIT 10

LETTER DATED MARCH 23, 1950

MAR 27 1950

Philadelphia, March 23, 1950.

Subject: Newark, N.J. - Proposed clearance for tracks, platforms and columns at new plant of Anheuser-Busch near Waverly Yard.

K. J. S.

Yours March 21, 1950:

You have given no valid reasons for permitting a clearance of 6'-1" for the platforms, which apparently are to be used only for the purpose of trucking from the bottling plant to the cars. In such an event, 8'-0" clearance would not be detrimental to their operations.

Enactment of a clearance law by the State in the future might result in having to cut the platforms back at considerable expense to the Anheuser-Busch Co. Some States now require 8'-0" clearance for freight platforms.

This is not an unreasonable requirement in view of the fact that we have had many personal injuries result from close clearances, involving heavy claim payments.

E. R. S.

A 377

PLAINTIFF'S EXHIBIT 11

LETTER DATED MARCH 28, 1950

New York 1, N.Y., March 28, 1950.

Subject:- ERS 3-23-1950: Newark, N.J. - Proposed clearance for tracks, platforms and columns at new plant of Anheuser-Busch near near Waverly Yard.

W. R. S. (2):

The reason for requesting a clearance of 6'1" is as stated in our letter of March 23, 1950, that sufficient tracks can be built in front of the Bottling Plant to handle its output. The platforms are to be equipped with conveyors, requiring a 22 foot width. Unless the 6'1" clearance is permitted, it will be necessary to eliminate one platform and track. Due to the location of the bottling plant, with respect to the ladder track that will be built to the north, to which ladder the platform tracks will be connected, the length of the platforms is limited.

Since the Industry has signed our standard side track agreement, it appears the 6'1" clearance could be used without involving the Railroad Company in damage suits.

It will be appreciated if you will give further consideration to granting the request of the Industry to vary from our standard clearance at the platforms.

As of interest, please note copy of letter December 6, 1949.

K. J. S.

A 378

PLAINTIFF'S EXHIBIT 12

LETTER DATED APRIL 6, 1950

Philadelphia, Pa., April 6, 1950.
Desk 5

APR 10 1950 APR 10 REC'D

The question has recently arisen as to liability for injuries to employes or damage to property of the Railroad Company, resulting from accidents when shifting cars over a private side track where structures have been erected providing less than standard clearance.

Our Legal Department, after a review of the present M.W. 14-C siding agreement, has concluded that it does not give the Railroad Company the necessary indemnification for accidents of this sort, therefore, in all future cases where the standard clearance for side tracks has been encroached upon, a separate agreement indemnifying the Railroad Company from liability for injuries to persons or damage to property that may occur on account of such encroachments, should be consummated to place all responsibility on the industry involved.

Enclosed herewith for your use is a specimen agreement that you are to prepare in all instances where any deviation from our standard clearance has been authorized.

While paragraph two of this letter specifies "future cases", we have in the recent past authorized clearances on private industry tracks that were not in strict conformity with our standard, and in all such cases you were instructed to secure an indemnifying agreement. In these instances the agreement to be prepared and executed is the specimen which is enclosed.

The following is a list at least in part, of some of the industries that have applied for and received permission to deviate from our adopted standard:

Sunbury, Pa. - Central Builders Supply Co.
Florin, Pa. - Bachman Company.
Philadelphia, Pa. - Philco Corp. - Extension of bridge at "C" and Ontario Streets.
Philadelphia, Pa. - Gross Brothers - Front and Venango Streets.
Newark (Waverly), N.J. - Anheuser-Busch siding.

Please see that the agreements are prepared and executed by the industry, then sent to this office, with the usual number of copies, for completion of execution by the Regional Vice President.

H. L. N.

Encl.

A 379

PLAINTIFF'S EXHIBIT 13

SUPPLEMENTAL AGREEMENT DATED NOVEMBER 16, 1950

THIS SUPPLEMENTAL AGREEMENT, made, in duplicate, this Sixteenth day of November, A.D. 1950, by and between THE PENNSYLVANIA RAILROAD COMPANY, hereinafter called the "Railroad Company", and ANHEUSER-BUSCH, INC., a Missouri Corporation, hereinafter called the "Industry";

WITNESSETH:

WHEREAS, the parties hereto entered into a Side-track Agreement, dated February 24, 1950, covering the construction, maintenance, ownership, use and operation of a private side-track, located upon the property of the Industry at Newark, N.J., at Waverly Yard;

AND WHEREAS, the Industry has constructed, or is about to construct platforms, hereinafter called "structure", with the clearance as shown upon print of plan bearing No. 4966, dated 4-28-1950, attached hereto, and made a part hereof as Exhibit "A";

NOW, THEREFORE, in consideration of the conditions and covenants hereinafter stated on the part of the Industry to be kept and performed, the Railroad Company agrees that it will operate upon the said side-track of the Industry under and adjoining the said structure with the 6'1" clearance aforesaid, but only under and subject to the conditons and covenants hereinafter mentioned which are hereby accepted and agreed to on the part of the Industry:

1. The said structure shall be constructed by the Industry without cost to the Railroad Company, with the clearances as shown upon Exhibit "A".

2. The Industry, at its sole cost, shall erect, maintain, repair and renew, keeping in good order and condition at all times, without notice from the Railroad Company, illuminated signs, as well as such other devices as may be necessary, to give adequate warning to the train and engine crew employes of the Railroad Company, of the said 6'1" clearance.

3. The Industry hereby releases and waives all right or alleged right at any time to ask for or demand damages from the Railroad Company, or its employes, that have occurred, or may occur, to the said Industry and the said structure, including loss of service thereof, caused by or growing out of the operation of the engine, equipment and cars of the Railroad Company upon the side-track adjoining said structure by reason of the 6'1" side clearances as shown upon the print of plan attached hereto; and the Industry further covenants and agrees to indemnify and save harmless the Railroad Company and its employes from and against all loss, cost, damage and expenses and claims and demands therefor caused by or attributable to the operation by the Railroad Company of its engines, equipment and cars upon the said side-track under and adjoining said structure, or injury to or damage caused thereto or thereby and whether to the property of the Railroad Company or to property in its possession, control or custody, to its employes, patrons or licensees, to the employes, patrons or licensees of the Industry, or to persons or property of others who may seek to hold the Railroad Company liable therefor, and whether attributable in whole or in part to the said 6'1" clearances.

Plaintiff's Exhibit 13

4. To the extent that the provisions of this Supplemental Agreement are inconsistent with the provisions of the above-mentioned Side-track Agreement between the parties hereto, the provisions of this Supplemental Agreement shall govern and control. In all other respects, however, the said Side-track Agreement between the parties hereto shall continue in full force and effect.

This Supplemental Agreement shall become and be effective upon its execution, and shall continue concurrently with the above mentioned side track agreement until said latter agreement shall have been terminated.

WHEREOF, the parties hereto have caused this Supplemental Agreement to be executed, in duplicate, the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY

Attest:

/s/ J. G. Watson
Asst. Secretary

By: E. W. Smith
Vice President

ANHEUSER-BUSCH, INC.

Attest:

/s/ K. Siebert.
Secretary

By: /s/ R. W. Upshaw
Vice President

A 381

PLAINTIFF'S EXHIBIT 14

LETTER DATED MAY 2, 1950

May 2, 1950

Harley, Ellington & Day, Inc.,
153 Elizabeth Street,
Detroit 1, Michigan.

Gentlemen:

In designing the plant of Anheuser-Busch, Inc., at Newark, N.J., it is our understanding you desire to use a distance of 6'1" from the edge of a platform or dock to the center of the adjacent track.

While this clearance provides space alongside cars for ordinary movements, it does not provide proper space for a man riding on the side of the cars. Our standard clearance, as you know, is 8'0" instead of the 6'1" you desire, this 8'0" distance being considered the proper clearance, as established in our standard side track agreement.

Since the clearance you desire is less than our standard, we have prepared a supplemental agreement to the side track agreement of February 24, 1950, three copies of which are attached. Two copies should be executed by Anheuser-Busch, Inc., and returned to us for further handling.

When the agreement is executed, it will be considered that we have given permission to using the 6'1" clearance. However, it should be understood that if a State Law is passed, setting the clearance at more than 6'1", Anheuser-Busch, Inc., may be placed to considerable expense to change the clearance to meet new requirements.

Yours very truly,

12.

Superintendent.

JS/p

A 382

PLAINTIFF'S EXHIBIT 25

EARNINGS OF BATCHKOWSKI AND RATES OF PAY

EARNINGS OF BATCHKOWSKI

1967	$7,813.88
1968	$8,798.29
1969	$2,545.04
1970	$3,767.24
1971	$4,260.03
1972	$1,434.29
1973	$ ----
1974	$ ----
1975	$ ----

RATES OF PAY

DATE	PER DAY	PER WEEK
January 1, 1967	$ 25.87	$ 125.35
January 1, 1968	26.52	132.60
July 1, 1968	27.85	139.25
January 1, 1969	28.41	142.05
July 1, 1969	29.26	146.50
January 1, 1970	30.72	153.60
November 1, 1970	33.28	166.40
April 1, 1971	34.61	173.05
October 1, 1971	36.34	181.70
April 1, 1972	38.16	190.80
October 1, 1972	40.07	200.85
January 1, 1973	42.27	211.35
April 1, 1973	43.07	215.35
January 1, 1974	44.79	223.95

A 383

PLAINTIFF'S EXHIBIT 26

ABSENTEEISM RECORD

DEFENDANTS' RECORDS SHOW MR. BATCHKOWSKI WAS ABSENT DURING THE FOLLOWING PERIODS OF TIME

November 8, 1968 to May 26, 1969

July 12, 1969 to August 5, 1969

August 29, 1969 to October 28, 1969

December 30, 1969 to January 5, 1970

May 25, 1970 to August 17, 1970

May 1, 1971 to July 9, 1971

August 27, 1971 to September 28, 1971

October 1, 1971 to October 15, 1971

January 8, 1972 to February 16, 1972

May , 1972 to date.

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MIKE J. BATCHKOWSKY,

Plaintiff,

- against -

PENN CENTRAL COMPANY a/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant and Third Party Plaintiff,

- against -

ANHEUSER-BUSCH, INC.,

Third Party Defendant.

- -x

69 Civ. 866

OPINION

41952

A P P E A R A N C E S :

JURON & MINZNER, ESQS.,
Attorneys for Plaintiff
501 Fifth Avenue
New York, New York 10017
(212) 697-8484

ALBERT A. JURON, ESQ.,
Of Counsel

ROBERT M. PEET, ESQ.,
Attorney for Defendant and
Third Party Plaintiff
466 Lexington Avenue
New York, New York 10017
(212) 340-3109

HENRY W. HERBERT, ESQ.,
Of Counsel

A 385

Union

JAYNE & McNERNEY, ESQS.,
Attorneys for Third Party
Defendant,
156 William Street
New York, New York 10038
(212) 964-1600

WILLIAM C. GAUS, ESQ.,
Of Counsel

CONNER, D. J.:

This is an action for personal injuries sustained by plaintiff, a brakeman employed by defendant Penn Central, when he was struck by handles projecting from the door of a refrigerator car in a string of cars being shoved by a Penn Central engine into a plant of third-party defendant, Anheuser-Busch in Newark, New Jersey.

A jury trial in late January, 1975, resulted in a verdict (1) that plaintiff's injuries were caused, at least in part, by the negligence of Penn Central, (2) that plaintiff was damaged in the amount of $200,000, and (3) that plaintiff's injuries were attributable, to the extent of 25%, to his own negligence, so that the award to him should be reduced to $150,000.

A third-party action by Penn Central against Anheuser-Busch for indemnification under the terms of a "supplemental" sidetrack agreement was simultaneously tried to the Court without a jury. This opinion incorporates the Court's findings of fact and conclusions of law in connection with the third-party claim, pursuant to Rule 52(a), F.R.Civ.P.

About 1950, Anheuser-Busch constructed a bottling plant on its property adjoining Penn Central's Waverly Yard in Newark. On February 24, 1950, it entered into a standard side-track agreement with Penn Central whereby Penn Central agreed to construct a side track on Anheuser-Busch's property, and each party agreed to indemnify the other from any loss, damage or injury caused by an act or omission of the former or its agents or employees "while on or about said track."

When Penn Central received the drawings of the proposed side track and learned that Anheuser-Busch, in order to provide an additional loading platform in the plant, proposed to reduce the lateral clearance from the standard 3' (measured outwardly from the center line of the rails to the nearest obstruction) to 6'1", it refused to proceed with construction until Anheuser-Busch executed a "supplemental" side-track agreement. This latter agreement, executed November 16, 1950 after extensive negotiations, contained this indemnification provision:

> "[T]he Industry [Anheuser-Busch] further covenants and agrees to indemnify and save harmless the Railroad Company and its employees from and against all loss, cost, damage and expense and claims and demands therefor caused by or attributable to the operation by the Railroad Company [Penn Central] of its engines, equipment and cars upon the said side-track under and adjoining said structure * * * whether attributable in whole or in part to the said 6'1" clearances." (Emphasis added).

This language clearly and unequivocally placed on Anheuser-Busch the risk for all accidents resulting from the operations of Penn Central on the side track under or adjoining the Anheuser-Busch plant, whatever the cause of the accident -- including the railroad's own negligence -- and whether the reduced clearance in any way contributed to it.

There is no reason at all to suspect that this language does not faithfully reflect the intentions of the parties. Nor is there any effective public policy against enforcing the contract as the parties wrote it.

The evidence does not clearly indicate where the supplemental agreement was executed and delivered but, in any event, the agreement should be construed under the laws of the State of New Jersey, since it related only to property located in New Jersey and indemnified the railroad only in connection with accidents occurring on that property; thus, "the most significant contacts with the matter in dispute" were clearly in New Jersey. Haag v. Barnes, 9 N.Y.2d 554 (1961); Auten v. Auten, 308 N.Y. 155 (1954). See also Speare v. Consolidated Assets Corp., 367 F.2d 208, 211 (2d Cir. 1966).

Under New Jersey law, such indemnity clauses

> "are to be viewed realistically as efforts by business men to allocate as between them the cost or expense of the risk of accidents * * * on a fairly predictable basis, rather than upon the generally

debatable and indeterminate criteria as to whose negligence, if any, the accident was caused by, and to what degree." Buscaglia v. Owens-Corning Fiberglas, 68 N.J. Super. 508, 172 A.2d 703, 707 (App.Div. 1961).

In indemnifying Penn Central against liability for injuries resulting from its operations on the side track, the parties must have intended to include injuries caused by the negligence of Penn Central, because in the absence of such negligence, Penn Central would have no liability requiring indemnification.

Anheuser-Busch nevertheless argues that the indemnity clause, by its own terms, applies only to injuries "caused by or attributable to" the 6'1" clearance. However, the clause in question says precisely the opposite. It expressly covers all injuries "caused by or attributable to" the operations of the railroad "upon the sidetrack under or adjoining the structure * * * whether attributable in whole or in part to the said 6'1" clearances." (Emphasis added).

But even if the contract did specifically limit the indemnity to injuries attributable in whole or in part to the reduced clearances, it would still apply to the present accident.

The undisputed testimony established that it was customary for a brakeman to ride on one of the ladders on the side of one of a string of cars being shoved onto a side track alongside a loading platform, from which position he can relay the signals from a conductor stationed on the platform near the spot where the leading end of the string will be positioned, to the engineman in the cab of the engine at the opposite end

of the train. The only reason that plaintiff Batchkowsky was not riding the side of one of the cars at the time of the accident was that the 6'1" clearance in the Anheuser-Busch plant left a space of only 3" or 4" between the side of the cars and the edge of the loading platform, which obviously allowed insufficient room for a man's body or even the lower part of his leg.

The drawing attached to the supplemental agreement required the erection, "at locations where they will provide ample warning to men riding on locomotives or cars," of illuminated signs reading "Platforms Inside Building Will Not Clear Man Riding on Side of Car," and such a sign was provided on the track where the accident occurred.

Accordingly, after riding the train up to the far side of an access road just outside the plant, Batchkowsky dismounted, protected the movement of the train across the roadway, then stationed himself on the ground alongside the track approximately 10 feet inside the door of the plant, in a space which was about 26 inches wide (measured from the side of the railroad cars to a concrete abutment at the side of a stairway leading up to the loading platform) and 17 feet 6 inches long (measured from the inside of the door of the plant to the adjacent end of the laterally projecting portion of the platform). Standing in this position, he could see the signals of the conductor standing near the far end of the platform (which was 45" high) and his relayed signals could be seen by the engineman in the cab.

This position would have afforded him ample room for safety if the door handles, which were about two feet in length, had not been left in a partially open position, projecting at an angle of about 45° from the outer surface of the door. Since he was facing the conductor, he did not see the oncoming handles, and was struck in the back by one of them, spun around and struck in the forehead by the other, knocking him to the ground.

Thus, if it had not been for the reduced clearance, the accident would not have occurred, because Batchkowsky would have been riding the side of one of the cars and not standing alongside the track in the path of the projecting handles.

Anheuser-Busch argues that, notwithstanding the 6'1" clearance, the accident could have been avoided if Batchkowsky had ridden on the end of one of the cars, or if he had stood either outside the building or in the recess at the bottom of the stairway. That is true, of course, but it still does not avoid the aforementioned fact that the accident would not have happened if the normal clearance of 8 feet had been provided, permitting Batchkowsky to follow the routine practice of riding the side of one of the cars.

Undoubtedly it was the testimony that Batchkowsky had seen the projecting handles earlier, and even

unsuccessfully attempted to close them, which induced the jury to find him contributorily negligent, apparently for failing to remember the handles and to clear a path for them, for example, by stepping back into the stairwell.

By reducing the award 25 percent, the jury has already taken fully into account the contribution which Batchkowsky made to his injury.

I accordingly conclude that Penn Central is entitled to full indemnification from Anheuser-Busch for the damages awarded to Batchkowsky and for the expenses of defending the action brought by him (but not the expenses of prosecuting the third-party claim, to the extent that the latter expenses can be segregated).

Settle order on notice.

William C. Conner
United States District Judge

Dated: New York, New York
February 25, 1975

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIKE J. BATCHKOWSKY,

Plaintiff,

- against -

PENN CENTRAL COMPANY n/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant and Third Party Plaintiff,

- against -

ANHEUSER-BUSCH, INC.,

Third-Party Defendant.

69 Civ. 866 W.C.

ORDER AND JUDGMENT

#

This action came on for trial before the Court and a jury, the Honorable William C. Conner, District Judge presiding, on the 27th day of January, 1975, and the issues having been duly tried and the jury having rendered its verdict in favor of plaintiff, Mike J. Batchkowsky, as against defendant and third party plaintiff, Penn Central Company n/k/a Penn Central Transportation Company, in the amount of one hundred fifty thousand dollars ($150,000), and the issues in third party action by Penn Central Company, n/k/a Penn Central Transportation Company, against third party defendant, Anheuser-Busch, Inc., having been duly tried by the Court without a jury and after argument of counsel and thereafter upon consideration thereof, and after due deliberation the Court having rendered an opinion dated February 25, 1975, in

favor of third party plaintiff, Penn Central Company, n/k/a Penn Central Transportation Company, and against the third party defendant, Anheuser-Busch, Inc., it is

ORDERED, ADJUDGED and DECREED that the plaintiff, Mike J. Batchkowsky, recover from the defendant and third party plaintiff, Penn Central Company, n/k/a Penn Central Transportation Company, the sum of one hundred fifty thousand dollars ($150,000) and his costs and disbursements of the action; and it is further

ORDERED, ADJUDGED and DECREED that the defendant and third party plaintiff, Penn Central Company n/k/a Penn Central Transportation Company, recover from the third party defendant, Anheuser-Busch, Inc., the sum of one hundred fifty thousand ($150,000) together with the amounts taxed as costs in favor of the plaintiff, Mike J. Batchkowsky against the defendant, and third party plaintiff, Penn Central Company n/k/a Penn Central Transportation Company, and the expenses incurred by the said defendant and third party plaintiff in defending the action brought against it by the plaintiff, Mike J. Batchkowsky.

William C. Conner
United States District Judge

Dated: New York, New York
March 12th, 1975

JUDGMENT ENTERED - 3/19/75

Raymond F. Burghardt
Clerk

NOTICE OF APPEAL OF THIRD-PARTY DEFENDANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MIKE J. BATCHOWSKY,

Plaintiff,

-against-

PENN CENTRAL COMPANY n/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant and Third-Party Plaintiff,

ANHEUSER-BUSCH, INC.,

Third-Party Defendant.

----------x

69 Civ. 866

NOTICE OF APPEAL CIRCUIT COURT OF APPEALS UNDER RULE 73(b)

S I R S :

PLEASE TAKE NOTICE that the above-named third-party defendant, ANHEUSER-BUSCH, INC., hereby appeals to the Circuit Court of Appeals for the Second Circuit from an Order and Judgment signed and entered by the Hon. William C. Conner, District Judge, wherein the issues having been duly tried and a jury having rendered its verdict in favor of the plaintiff, MIKE J. BARCHKOWSKY, as against the defendant and third-party plaintiff, PENN CENTRAL COMPANY n/k/a PENN CENTRAL TRANSPORTATION COMPANY, in the amount of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000), and thereafter the issues in the third-party action by PENN CENTRAL COMPANY n/k/a PENN CENTRAL TRANSPORTATION COMPANY against third-party defendant, ANHEUSER-BUSCH INC., having been duly tried by the Court without a jury and the Court having rendered an opinion, dated February 25, 1975, in favor of the third-party plaintiff, PENN CENTRAL COMPANY n/k/a PENN CENTRAL TRANSPORTATION COMPANY, as against the third-party defendant ANHEUSER-BUSCH INC. this third-party defendant takes this appeal from each and every part of said Order and Judgment that pertains to the original action

between plaintiff and defendant and third-party plaintiff wherein the jury rendered a verdict and this appeal is also taken from each and every part of the said Order and Judgment that pertains to the third-party defendant wherein the Court rendered its decision between the third-party plaintiff and third-party defendant, and further this appeal is taken from each and every part of the entire Order and Judgment and Bill of Costs as well as the whole thereof. The above Order and Judgment were entered on or about March 18, 1975.

Dated, New York, N.Y.,

March 21, 1975

Yours, etc.,

JAYNE & GAUS

Member of the Firm
Attorneys for Third-Party Defendant-Appellant, AMBUSH-BUSH, INC.
156 William Street
New York, N.Y. 10038

TO:

ROBERT M. PUNT, ESQ.
Attorney for Defendant and
Third-Party Plaintiff
466 Lexington Avenue
New York, N.Y. 10017

JURON & MINZER, ESQS.
Attorneys for Plaintiff
501 Fifth Avenue
New York, N.Y. 10017

CLERK OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Due and timely service of ONE copies
of the within APPENDIX is hereby
admitted this 30TH day of MAY 1975

.....
Attorneys for PLAINTIFF - APPELLEE

Robert M. Pettiton

ATTORNEY FOR DEFENDANT AND
THIRD PARTY PLAINTIFF - APPELLEE